United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

74-1878

B/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

UNITED STATES OF AMERICA, :

Appellee, :

-against- :

IRWIN LAYNE et.al., :

Defendants-Appellant. :

----------X

Docket No.

APPENDIX FOR APPELLANTS LAYNE AND MCGEE

EDWARD S. PANZER
Attorney for Appellant Layne
299 Broadway
New York, New York
(212) 349-6128
LAWRENCE STERN
Of Counsel

Robert Mitchell
Attorney for Appellant McGee

PAGINATION AS IN ORIGINAL COPY

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INDICTMENT

:slc
7

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA :

- v - :

THEODORE KOSS, :
KOSS SECURITIES CORPORATION,
STEPHEN ZARDUS, :
ROBERT SANTIS,
HERBERT SHULMAN, :
STEVEN ADLMAN,
ROBERT KOLBERT, :
STANLEY SCHWARTZ,
SAMUEL WEISMAN, :
HAROLD LASSOFF,
MARTIN ROTH, :
ERWIN LAYNE,
IRWIN HYMAN, :
WILLIAM McGEE,
STEPHEN HAGLER and
DAN ANFANG, :

Defendants. :

- - - - - - - - - - - - - - - - - - - -x

73 Cr. 905

INDICTMENT

COUNT ONE

The Grand Jury charges:

1. From on or about the first day of November, 1970 and continuously thereafter, up to and including the date of the filing of this Indictment, in the Southern District of New York and elsewhere, THEODORE KOSS, KOSS SECURITIES CORPORATION, STEPHEN SANDUS, ROBERT SANTIS, HERBERT SHULMAN, STEVEN ADLMAN, ROBERT KOLBERT, STANLEY SCHWARTZ, SAMUEL WEISMAN, HAROLD LASSOFF, MARTIN ROTH, ERWIN LAYNE, IRWIN HYMAN, WILLIAM McGEE, STEPHEN HAGLER and DAN ANFANG, the defendants herein, and Automated Information Systems, Inc., Michael Hellerman, Murray Taylor, Murray Levine, Robert Angona, Interstate Equity Corporation and Atlantic Securities, named herein as co-conspirators but not as defendants, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other and with other persons known and unknown to the Grand Jury to commit certain offenses against the United States of America, to wit, violations of Title 15, United States Code, Sections 77q(a), 77(x), 78j(b) and 78ff and Rule 10b-5 (17 C.F.R. 240.10b-5) of the rules and regulations promulgated by the United States Securities and

Exchange Commission ("Commission") under the Securities Exchange Act of 1934 ("Exchange Act"); and Title 18, United States Code, Section 1341.

THE DEFENDANTS

2. The defendant THEODORE KOSS was, at all times material to this Indictment, a principal of the broker-dealer firm of defendant KOSS SECURITIES CORPORATION.

3. The defendant KOSS SECURITIES CORPORATION was, at all times material to this Indictment, a broker-dealer in securities duly registered with the Commission, located at 1416 Avenue M, Brooklyn, New York.

4. The defendant STEPHEN ZARDUS was, at all times material to this Indictment, the principal of the registered broker dealer firm Interstate Equity Corporation, named herein as co-conspirator.

5. The defendant ROBERT SANTIS was, at all times material to this Indictment, the president of co-conspirator Automated Information Systems, Inc.

6. The defendant HERBERT SHULMAN was, at all times material to this Indictment, a trader in securities at the registered broker dealer firm of Donler, Gray & Co., Inc.

7. The defendant STEVEN ADLMAN was, at all times material to this Indictment, a self-employed promoter and finder.

8. The defendant ROBERT KOLBERT was, at all times material to this Indictment, a registered representative at the registered broker dealer firm of Perkauf, Bogren & Co.

9. The defendant STANLEY SCHWARTZ was, at all times material to this Indictment, a principal of the registered broker dealer firm of Atlantic Securities, named herein as co conspirator.

10. The defendant SAMUEL WEISMAN was, at all times material to this Indictment, an attorney admitted to practice in the State of New York.

11. The defendant HAROLD LACHOFF was, at all times material to this Indictment, a registered representative at the registered broker dealer firm of Pressman Frolich and Frost, Inc., and serviced the brokerage account of defendant SAMUEL WEISMAN.

12. The defendant MARTIN ROTH was, at all times material to this Indictment, an attorney admitted to practice in the State of New York.

13. The defendant ERWIN LAVINE was, at all times material to this Indictment, a self employed promoter and finder.

14. The defendant IRWIN HYMAN was, at all times material to this Indictment, an automobile salesman.

15. The defendant WILLIAM McGEE was, at all times material to this Indictment, an employee of the Chelsea National Bank.

16. The defendant STEPHEN HACKER was, at all times material to this Indictment, a registered representative at the registered broker dealer firm of Herkauf Borgen & Co.

17. The defendant DAN ANFANG was, at all times material to this Indictment, a registered representative at the registered broker dealer firm of Bruns, Nordman & Co.

OBJECTS OF THE CONSPIRACY

18. It was part of said conspiracy that the defendants and co-conspirators unlawfully, wilfully and knowingly, in the offer to sell and sale of securities, to wit, the common stock of co-conspirator Automated Information Systems, Inc., by the use of means and instruments of transportation and communication in interstate commerce and by use of the mails, would directly and indirectly, (a) employ devices, schemes and artifices to defraud, (b) obtain money and property by means of untrue statements of material facts and omissions to state

material facts necessary in order to make the statements made in light of circumstances under which they were made, not misleading, and (c) engage in transactions, practices and courses of business which operated and would operate as a fraud and deceit upon the purchasers of the aforementioned securities and upon any and all persons to whom the said defendants and co-conspirators, directly and indirectly, would attempt to sell the aforementioned securities.

19. It was further part of said conspiracy that the defendants and co-conspirators, in connection with the purchase and sale of securities, to wit, the common stock of co-conspirator Automated Information Systems, Inc., would and did, directly and indirectly, use means and instrumentalities of interstate commerce and the mails to use and employ manipulative and deceptive devices and contrivances in contravention of Rule 10b-5 (17 C.F.R. 240.10b-5) of the rules and regulations promulgated by the Commission.

20. It was further part of said conspiracy that the defendants and co-conspirators, having devised and intending to devise a scheme and artifice to defraud, and attempting so to do, would place and cause to be placed in post offices and authorized depositories for mail matter, and would cause to be delivered by mail according to the direction thereon, certain matter to be sent and delivered by the Post Office Department.

MEANS OF THE CONSPIRACY

21. Among the means by which the defendants and co-conspirators would and did carry on such conspiracy were the following:

(c) In or about January and February, 1971, defendants STEPHEN ZARDUS, ROBERT SANTIS and THEODORE KOSS agreed that co-conspirators Murray Taylor and Michael Hellerman would supply defendant STEPHEN ZARDUS with the names of subscribers and the monies to purchase 50,000

shares, of common stock of co conspirator Automated Information Systems, Inc.

(d) Defendant ROBERT SANTIS and co conspirator Michael Hellerman agreed that defendant ROBERT SANTIS would pay to co-conspirator Michael Hellerman approximately one half of the proceeds of the underwriting.

(e) In or about February, 1971 and March, 1971, defendants MARTIN ROTH and ERWIN LAYNE and co-conspirators Michael Hellerman and Murray Taylor and others signed stock powers for several certificates issued in the names of subscribers supplied to defendant STEPHEN ZARDUS by co-conspirator Michael Hellerman.

(f) In or about March and April, 1971, defendants THEODORE KOSS, KOSS SECURITIES CORPORATION and HERBERT SHULMAN, and others traded the common stock of co-conspirator Automated Information Systems, Inc. in the over-the-counter market, while defendant STEPHEN ZARDUS, and co conspirators Michael Hellerman and Murray Taylor and Interstate Equity Corporation were selling common stock of Automated Information Systems, Inc. through co conspirator Interstate Equity Corporation.

(g) In or about March and April, 1971, defendants THEODORE KOSS and KOSS SECURITIES CORPORATION purchased shares of the common stock of Automated Information Systems, Inc. from their customers and placed the shares in the firm account; said shares were purchased from these customers below the prevailing market price.

(i) In or about April, 1971, defendants HERBERT SHULMAN, STEVEN ADLMAN and ROBERT KOLBERT met and agreed with co-conspirator Michael Hellerman that defendants HERBERT SHULMAN, STEVEN ADLMAN and ROBERT KOLBERT would trade and recommend to brokers and investors that they purchase the common stock of co-conspirator Automated Information Systems, Inc.; defendants HERBERT SHULMAN, STEVEN ADLMAN and ROBERT KOLBERT received cash payments.

(l) In or about April, May and June, 1971 defendants MARTIN ROSS and EMILIA LAVIN and others endorsed checks drawn against the account of co conspirator Interstate Equity Corporation in the names of persons unknown to them; said checks were then delivered to co conspirator Michael Mellerson who cashed said checks.

(m) In or about June, 1971, defendants WILLIAM McGEE and STEPHEN HAGLER received cash payments for recommending and influencing others to purchase the common stock of co-conspirator Automated Information Systems, Inc.

22. As a result of the manipulative and deceptive devices enumerated in paragraph 21 hereinabove, the over the counter market price of the common stock of co-conspirator Automated Information Systems, Inc. rose from $1.00 per share to approximately $5.50 per share.

23. As a result of the manipulative and deceptive devices enumerated in paragraph 21 hereinabove, investors in the common stock of Automated Information Systems, Inc. incurred financial loss.

OVERT ACTS

24. In furtherance of the conspiracy and to effect the objects thereof, the defendants committed the following overt acts, among others, in the Southern District of New York:

(a) In or about January, 1971, ROBERT SANTIS and STEPHEN ZARDUS entered the Plaza Hotel, New York, New York;

(b) On or about February 22, 1971, STEPHEN ZARDUS entered the Pier 52 restaurant in New York, New York;

(c) On or about March 1, 1971, defendant ROBERT SANTIS delivered two cashiers checks payable to "Louis Greenblatt;"

(d) On or about April 7, 1971, defendant STEPHEN ZARDUS and co-conspirator Interstate Equity Corporation purchased approximately 1100 shares of the common stock of co-conspirator Automated Information Systems, Inc. from defendants THEODORE KOSS and KOSS SECURITIES CORPORATION for the account of "Sidonie Horner;"

(i) On or about May 29, 1971, defendant [illegible] ADLMAN sold 2000 shares of the common stock of co-conspirator Automated Information Systems, Inc;

(j) On or about June 4, 1971, defendant ROBERT KOLBERT purchased 400 shares of the common stock of co-conspirator Automated Information Systems, Inc. for the account of "K. Chapin ;

(k) On or about June 6, 1971, defendant WILLIAM McGEE received cash;

(l) On or about June 6, 1971, defendant STEPHEN HAGLER received cash;

(o) On or about June 10, 1971, defendant ERWIN LAYNE had a conversation.

(Title 18, United States Code, Section 371.)

COUNT TWO

The Grand Jury further charges:

1. From on or about the first day of November, 1970, up to and including the date of the filing of this Indictment, in the Southern District of New York and elsewhere, the defendants THEODORE KOSS, KOSS SECURITIES CORPORATION, STEPHEN ZARDUS, ROBERT SANTIS and STANLEY SCHWARTZ and others, unlawfully, wilfully and knowingly, in the offer and sale of securities, to wit, the common stock of Automated Information Systems, Inc. by the use of the means and instruments of transportation and communication in interstate commerce and by use of the mails, directly and indirectly, (a) did employ a device, scheme and artifice to defraud, (b) did obtain money and property by means of untrue statements of material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and (c) did engage in transactions, practices and courses of business which would and did operate as a fraud and deceit upon purchasers of said securities and other persons

whom the said defendants, directly and indirectly attempted to induce to purchase said securities.

2. The allegations contained in paragraph 21 of Count One of this Indictment are repeated and realleged as though fully set forth herein as constituting and describing the means by which the defendants committed the offense charged in paragraph 1 of this count.

3. On or about the dates hereinafter set forth in Count Two, in the Southern District of New York, the defendants THEODORE KOSS, KOSS SECURITIES CORPORATION, STEPHEN ZARDUS, ROBERT SANTIS and STANLEY SCHWARTZ, unlawfully, wilfully and knowingly did use and cause to be used the means and instruments of transportation and communication in interstate commerce and the mails pursuant to and in furtherance of the scheme alleged in paragraph one of this count as hereinafter set forth:

DATE	ADDRESSEE	MATTER
(a) March 2, 1971	Interstate Equity Corp. 44 Grove Street New York, New York	Check for the purchase of 2000 shares of the common stock of Automated Information Systems, Inc.

(Title 15, United States Code, Sections 77q and 77x; Title 18, United States Code, Section 2.)

COUNT THREE

The Grand Jury further charges:

1. From on or about the first day of November, 1970, up to and including the date of the filing of this Indictment, in the Southern District of New York and elsewhere, the defendants THEODORE KOSS, KOSS SECURITIES CORPORATION, STEPHEN ZARDUS, ROBERT SANTIS, HERBERT SHULMAN, SAMUEL WEISMAN, HAROLD LASSOFF, MARTIN ROTH, ERWIN LAYNE, IRWIN HYMAN, WILLIAM McGEE, STEPHEN HAGLER and DAN ANFANG, and others, unlawfully, wilfully and knowingly did, directly

and indirectly, by use of means and instrumentalities of interstate commerce and the mails, use and employ in connection with the purchase and sale of securities, to wit, the common stock of Automated Information Systems, Inc., manipulative and deceptive devices and contrivances in contravention of Rule 10b-5 (17 C.F.R. Section 240.10b-5) of the rules and regulations of the United States Securities and Exchange Commission.

2. The allegations contained in paragraph 21 of Count One of this Indictment are repeated and realleged as though fully set forth herein, as constituting and describing the means by which the defendants committed the offense charged in paragraph 1 of this count.

3. On or about the dates hereinafter set forth in Count Three, in the Southern District of New York, said defendants unlawfully, wilfully and knowingly did use and cause to be used means and instrumentalities of interstate commerce and the mails pursuant to and in furtherance of the scheme alleged in paragraph 1 of this count, by causing orders to purchase the common stock of Automated Information Systems, Inc. to be sent through the mails to the persons hereinafter set forth the matter hereinafter set forth:

DATE	ADDRESSEE	MATTER
(b) May 3, 1971	Bernard Weber	Confirmation of purchase of 500 shares of Automated Information Systems, Inc. common stock.

(Title 15, United States Code, Sections 78j(b) and 78ff; Title 18, United States Code, Section 2.)

COUNT FOUR

The Grand Jury further charges:

1. From on or about the first day of November, 1970, up to and including the date of the filing of this Indictment, in the Southern District of New York and elsewhere, the defendants THEODORE KOSS, KOSS SECURITIES

CORPORATION and [redacted] ZARDUS, and others unknown, all fully and knowingly did, directly and indirectly by use of means and instrumentalities of interstate commerce and the mails effect transactions in, and induce and attempted to induce the purchase and sale of the common stock of Automated Information Systems, Inc., in connection with fraudulent, deceptive and manipulative acts and practices in contravention of Rule 15(c) 2-4 (17 C.F.R. 240.15(c) 2-4) of the rules and regulations of the United States Securities and Exchange Commission.

2. The allegation contained in paragraph 21 of Count One of this Indictment are repeated and realleged as though fully set forth herein, as constituting and describing the means by which the defendants committed the offense charged in paragraph 1 of this count.

3. The defendants, while participating in the distribution of securities, to wit, the common stock of Automated Information Systems, Inc., on an all or none basis underwriting did unlawfully, wilfully and knowingly fail to promptly deposit the monies received from the underwriting in a separate bank account, as agent and trustee for the persons who had the beneficial interests in said monies and did fail to promptly transmit to a bank which had agreed in writing to hold all such funds in escrow for the persons who had the beneficial interests therein all such monies received from the underwriting.

(Title 15, United States Code, Sections 78o(c)(2) and 78ff; Title 18, United States Code, Section 2.)

COUNTS FIVE THROUGH ELEVEN

The Grand Jury further charges:

1. From on or about the first day of November, 1970, up to and including the date of the filing of this Indictment, in the Southern District of New York and

elsewhere, the defendants THEODORE [illegible], [illegible] CORPORATION, STEPHEN ZARDUS, ROBERT BATTLE, HERBERT LAUMAN, STEVEN ADLMAN, ROBERT KOLBERT, STANLEY SCHWARTZ, SAMUEL WEISMAN, HAROLD LASSOFF, MARTIN ROTH, ERWIN LAYNE, IRWIN HYMAN, WILLIAM McGEE, STEPHEN HAGLER, and DAN ANFANG, and others, unlawfully, wilfully and knowingly did devise and intend to devise a scheme to defraud purchasers of the common stock of Automated Information Systems, Inc., and to obtain money and property from said persons by means of false and fraudulent pretenses, representations and promises, and for the purpose of executing said scheme and artifice to defraud and attempting so to do, did place and caused to be placed in post offices and authorized depositories for mail matter and did cause to be delivered by mail, according to the directions thereon, certain matter to be sent and delivered by the Post Office Department, as more particularly set forth below.

2. The allegations contained in paragraph 21 of Count 1 of this Indictment are repeated and realleged as though fully set forth herein as constituting and describing the means by which the defendants committed the offense charged in Paragraph One of these counts.

3. On or about the dates hereinafter set forth in Counts Five through Eleven in the Southern District of New York and elsewhere, said defendants unlawfully, wilfully and knowingly did cause to be placed in post offices and authorized depositories for mail, and did cause to be delivered by mail by the Post Office Department according to the directions thereon, to the persons hereinafter set forth, the matter hereinafter set forth:

COUNT	DATE	ADDRESSEE	MATTER
5	April 21, 1971	Jackie Mason	Confirmation of purchase of 600 shares of Automated Information Systems, Inc. common stock.

8	June 4, 1971	F. Chrein	Confirmation of purchase of 800 shares of Automated Information Systems, Inc. common stock.
11	June 11, 1971	L. Zankel	Confirmation of purchase of 200 shares of Automated Information Systems, Inc. common stock.

(Title 18, United States Code, Sections 1341 and 2.)

COUNT THIRTEEN

The Grand Jury further charges:

1. On or about June 15, 1971, in the Southern District of New York, the defendant THEODORE KOSS, in a matter within the jurisdiction of the United States Securities and Exchange Commission, did unlawfully, wilfully and knowingly make and use and submit false writings and documents to said United States Securities and Exchange Commission knowing the same to contain false, fictitious and fraudulent statements and entries, to wit, documents reflecting purchases and sales of the common stock of Automated Information Systems, Inc., by and through the brokerage firm of KOSS SECURITIES CORPORATION.

(Title 18, United States Code, Section 1001.)

Foreman

PAUL J. CURRAN
United States Attorney

DOCKET ENTRIES

D. C. Form No. 100

CRIMINAL DOCKET

JUDGE METZNER

73 CRIM. 903

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.:
vs.	Ira Lee Sorkin, AUSA
	263-6342
(See Over for defendants)	
	For Defendant:

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
Fine,		10/13/74	Bartlett	5 —	
Clerk,		10/24/74	Treas		5 —
Marshal,		10/24/74	Rosenberg	5 —	
Attorney,		10/25/74	Treas		5 —
Commissioner's Court,					
Witnesses,					
(Thirteen Counts)					

DATE	PROCEEDINGS
	18:371-Conspiracy to violate federal securities laws.(Ct.1)
	15:77q,77x,78j(b),78ff,78o(c)(2)& 18:2.-Fraud in the offer and sale of securities; fraud in connection with purchase and sale.(Cts.2-4)
	18:1341. Using the mails to defraud in a scheme to raise stock prices. (Cts.5-11)
	18:1001- Making false statements before S.E.C.(Cts.12-13)
9-25-73	Filed indictment.

73Cr903 #3 Metzner, J. 73Cr 903

DATE	PROCEEDINGS
10-9-73	ALL DEFENDANTS (Attys.present) Plead Not Guilty.(all) defts. ordered photographed and fingerprinted.
	Case assigned to Judge Metzner for all purposes.
	Deft.T. Koss- Bail fixed at $25,000. P.R.B. (Bail limits to include (
	Deft. Zardus-Bail fixed at $15,000. P.R.B.
	Deft. Santis-Bail fixed at $20,000. P.R.B.)(Bail limits include Mass (and a nine day trip to Denmark)
	Deft.Schulman-Bail fixed at $10,000. P.R.B.
	Deft. Adlman-(Bail fixed at $15,000. P.R.B.
	Deft.Kolbert-Bail fixed at $15,000. P.R.B.
	Deft.Schwartz-Bail fixed at $15,000. P.R.B.
	Deft.Weisman-Bail BASED ON HIS OWN RECOGNIZANCE.
	Deft. Lassoff-Bail fixed at $5,000. P.R.B.
	Deft. Layne-Bail fixed at $10,000. P.R.B.(Deft. presently encarcerat
	Deft.Roth-Bail fixed at $20,000P.R.B. (in Danbury, Conn.)Layne)
	Deft.Layman-Bail fixed at $15,000.P.R.B.
	Deft.McGee-Bail fixed at $15,000.P.R.B.
	Deft.Aufang-Bail fixed at $10,000. P.R.B.
	Deft. Hagler-Bail fixed at $10,000P.R.B.(Bail limits include Arizona
	Koss Securities Corp thru Theodore Koss,Pres. Pleads not guilty.
	Griesa,J.
Oct-9-73	ROTH- Filed unsecured P.R.B. in the sum of $20,000. - Bail limits extended to Continental USA - Clerk
~~Oct-9-73~~	~~PENA- Filed unsecured P.R.B. in the sum of $10,000. -- Clerk~~ Error see 73-918
Oct-9-73	ANFANG- Filed unsecured P.R.B. in the sum of $10,000. - Bail limits extended to Eastern District of N.Y. -- Clerk
Oct-9-73	HAGLER- Filed unsecured P.R.B. in the sum of $10,000. - Bail limits extended to Arizona and the E.D. of NY. -- Clerk
Oct-9-73	LASAOFF- Filed unsecured P.R.B. in the sum of $5,000. - Bail limits extended to Eastern D. of NY and all of New York State.
Oct-9-73	HYMAN- Filed unsecured P.R.B. in the sum of $15,000. -- Bail limits extended to New York City Area only. -- Clerk
Oct-9-73	SCHULMAN- Filed unsecured P.R.B. in the sum of $10,000. - Bail limits extended t the Eastern D. of NY. -- Clerk
Oct-9-73	KOSS- Filed unsecured P.R.B. in the sum of $25,000. -- Bail limits extended to the SDNY, EDNY & CONN. -- Clerk
Oct-9-73	ZARDUS- Filed unsecured P.R.B. in the sum of $15,000. -- Bail limits extended to S.D. of Florida and D.of N.J. -- Clerk
Oct-9-73	KOLBERT- Filed unsecured P.R.B. in the sum of $15,000. -- Bail Rimits extended t FDNY. -- Clerk.
Oct-9-73	SANTIS- Filed unsecured P.R.B. in the sum of $20,000. -- Bail limits extended to to Boston, Mass., N.Y. State and Europa. -- Clerk.
Oct-9-73	ADLMAN- Filed unsecured P.R.B. in the sum of $15,000. -- Clerk.
Oct-9-73	SCHWARTZ- Filed unsecured P.R.B. in the sum of $15,000. -- Bail limits extended to E.D. of NY. -- Clerk.
Oct-9-73	McGee- Filed unsecured P.R.B. in the sum of $15,000. -- Bail limits extended to the EDNY. -- Clerk.
Oct-10-73	Layne- Filed CJA appointment of Edward Panzer, 299 B'way, NYC as counsel for defendant.
Oct-10-73	SCHULMAN- Filed notice of appearance by Stephen Gillers, Esq., 250 B'way, NYC Phone: 349-6646
Oct-12-73	ADLMAN- Filed notice of limited appearance for arrangement only of Ronald Podolsk 15 Park Row, NYC - 962-3351

D. C. 109 Criminal & Bankruptcy Continuation Sheet

	PROCEEDINGS
2-73	ANFANG- Filed notice of appearance by Gerald Shargel, Esq., 522 Fifth Ave., NYC 10036 - Phone: 687-4100
2-73	SANTIS- Filed notice of appearance by Ira D. Feinberg, Esqs., 31 Mill St., Boston, Mass.
2-73	KOLBERT- Filed notice of appearance by Richard Kaplan, Kraditore & Haber, Esqs., 595 Madison Ave., NYC 10022 Phone: 371-9700
2-73	THEODORE KOSS and KOSS SECURITIES CORP.- Filed notice of appearance by Morris Weissberg, Esqs. 15 Park Row, NYC 10038 - Phone 964-0492
-73	HAGLER- Filed notice of appearance by Pryor Cashman & Sherman, Esqs., 410 Park Ave., NYC - Phone 421-4100
2-73	ROTH- Filed notice of appearance by Greenman and Arsnau, Esqs. by Paul P. Jaffe, 14 Mamaroneck Ave., White Plains, NY 10601 (914-946-2500)
7-73	McGEE- Filed defendants financial affdvt.
7-73	SCHWARTZ- Filed defendants financial affdvt.
7-73	HYMAN- Filed defendants finacial affdvt.
17-73	WILLIAM MC GEE- Filed CJA appointment of John R. Horan, Esq., 300 Mad. Ave., NYC as counsel for defendant -- Metzner, J.
17-73	IRWIN HYMAN- Filed CJA appointment of Joel Winograd of Lauritano, Schlacter, Staller & Winograd, Esqs., 205 W. 34th St., NYC as counsel for defendant. - Metzner, J.
17-73	STANLEY SCHWARTZ- Filed CJA appointment of Julius Wasserstein, Esq., 26 Court St., Brooklyn, NY 11242 -- Metzner, J.
18-73	THEODORE KOSS- Filed affdvt. and notice of motion for a bill of particulars, inspection, severance, inspection of grand jury minutes and to dismiss - ret. 10-26-73 at 10 AM in Rm 2201
18-73	THEODORE KOSS- Filed memorandum in support of above motion.
11-73	LAYNE- Filed Governments affdvt. for a W/H/C - writ issued - ret. 10-15-73
25-73	McGEE- Filed CJA appointment of Robert Mitchell as Atty. for defendant. -- Metzner, J.
31-73	S. SCHWARTZ- Filed order extending defendants bail limits to include Plainfield, N.J. for the purpose of visiting his son at 652 Sheridan Ave. -- Metzner, J.
-1-73	LAYNE- Filed affdvt. and notice of motion for severance.
29-73	LAYNE-Filed writ of H/C --writ satisfied Oct.16,1973.MacMahon,J.
-73	LASSOFF--Filed defts. financial affdt.
-73	LASSOFF--Filed CJA appointment of Roger Hawke Brown,Wood,Fuller,Caldwell & Ivey 1 Liberty Plaza,NYC 10006 Metzner, J.
16-73	SCHWARTZ- Filed affdvt. and notice of motion for inspection of Grand Jury Minutes, to dismiss, for severance, discovery & inspection. - ret. 11-27-73
-73	HAGLER--Filed defts. motion for discovery and inspection and bill of particulars ret. on: Dec. 4, 1973.
-73	HAGLER--Filed defts. memorandum of law in support of deft's. motion for discovery and inspection and bill of particulars.
-73	ZARDUS--Filed defts. affdt. and notice of motion for suppression,etc.,
-73	SANTIS--Filed defts. affdt. and notice of motion for discovery,etc., ret. on Dec. 11,1973.
-73	ZARDUS--Filed defts. memorandum of law in support of pre trial motion for discovery.
-73	ADLMAN--Filed defts. affdt. and notice of motion for an order directing pltf. to furnish a bill of particulars,etc. ret. on:Nov.27,1973.
-73	WEISMAN--Filed defts. memorandum of law in support of defts.motion for severance.
-73	WEISMAN--Filed defts. motion for severance and affdt. ret. on: Nov.27,1973.
-73	WEISMAN--Filed defts. affdt. and motion for particulars and discovery.ret.: Nov. 27,1973.

DATE	PROCEEDINGS
Nov.23-73	DAN ANFANG--Filed defts. affdt. and notice of motion for an order severing said defts. from the trial,ret. on: Nov. 27, 1973.
Nov.23-73	LASSOFF--Filed defts. affdt. and notice of motion for an order direc the govt. to file and serve a bill of particulars,etc. ret. on: Nov. 27, 1973.
Nov.23-73	LASSOFF--Filed defts. memorandum in support of above motion.
Nov.27-73	ROTH--Filed defts. motion for discovery.
Nov.27-73	ROTH--Filed defts. memorandum in support of motions for discovery and a bill of particulars and for severance.
Nov.27-73	ROTH--Filed defts. motion for a bill of particulars.
Nov.27-73	ROTH--Filed defts. motion forseverance.
Nov.29-73	ALL DEFTS.--Filed govt's. notice of motion for an order requiring the US Atty. to answer pre trial motions on or before Jan. 16,19
Dec.13-73	Filed Govt Motion for Discovery and Inspection and Bill of Particulars
Dec.13-73	Filed Govt. Memorandum of Law
Dec.21-73	Filed Memorandum in support of Deft. Samoul Weisman's motion for Particulars and Discovery and for Severance.
Dec-26-73	T. KOSS- Filed order enlarging defts. bail limits to include travel to and from Las Vegas, Nevada for the period from 12-27-73 through Jan-4-74. -- Metzner, J.
Dec-28-73	IASSOFF- Filed reply memorandum by deft.
Jan- 7-74	HAGLER - Filed order enlarging defts. bail limits to include Antigua from Jan-8-7 to Jan-3-74 m/n
Dec.28-74	ERWINLLAYNE - Filed CJA Appointment Copy 2- approving payment to RobertxMx Edward Panzer (mailed copy 1 of CJA 20 to Adm. Office.
1-22-74	ZARDUS - Filed Financial Affidavit - Metzner, J.
Jan.24-74	THEODORE KOSS-KOSS CONSTRUCTION CORP. Filed Supplemental Affidavit of Morris Weiss in support of their motion dtd 10/17/73 for a bill of particulars, for discove and inspection of documents and grand jury minutes, to dismiss the indictment
Jan.25-74	Filed one sealed envelope. Said envelope contained an affdt. and shall be sealed and delivered to the Clerk of the Court and not opened until further notice and order of the court. So ordered, Metzner. J.
Feb.19-74	STEPHEN ADLMAN - Filed Financial Affidavit.
Feb.19-74	IRWIN HYMAN - Order of substitution of counsel to Deyan Ranko Brashich - Metzner,
Feb.26-74	STANLEY SCHWARTZ - Filed memo-endorsed on Motion dtd. 11/16/73 -- Motion toInspe Grand Jury Minutes and to Dismiss the Indictment is denied. Motion to Suppress statements is denied; Motion for Severance will be disposed of in a separate memorandum, Motion for Discovery and Inspection is granted Items 1.2.3.4.5.6.7.8 10.11.12.13.14 and 15 granted. Items 16 and 17 are granted as consented to the government, Items 18 through 24 are granted. Item 25 denied, Item 26 granted Item 27 denied, Motion for Brady Material, is granted to the extent of the government's obligation to comply with 373 U.S.83 The government shall make available any such material as soon as it becomes aware of its existence. So o Metzner,J. (m/n)

over

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-1.9

DATE	PROCEEDINGS
.26-74	MARTIN ROTH--Filed Memo endorsed on motion dtd. 11/27/74 --Motion for a bill of particulars disposed of as follows - Item 1 is denied, Item 2, denied, Item 3 granted Item 4 denied Item 5 is granted as consented by the govt., Item 6 is denied, Item 7 is granted - So ordered - Metzner, J. (m/n)
b.26-74	MARTIN ROTH - Filed memo-endorsed on Motion for Discovery dtd. 11/27/73--Items1,2&3 granted, Item 4 granted, item 5 denied, Item 6 granted Item 7 denied Item 8 denied So ordered - Metzner, (m/n)
b.26-74	HAROLD LASSOFF - Filed Memo-endorsed on Notice of Motion dtd 11/23/63--Motion for Bill of Particulars denied in part and granted in part; Motion for Discovery and Inspection granted and denied in part. Motion for a Severance will be disposed of in a spparate memorandum. So ordered - Metzner, J. (m/n)
b.26-74	ERWIN LAYNE - Filed memo-endorsed on Notice of Motion dtd 11/1/73--The motion for severance will be disposed of in a separate memorandum. Motion to strike as prejudicial a portion of the indictment as surplusage is denied. This deft's. motion to join in the motions of all co-defts. is granted to the extent they are relevant to this deft. So ordered - METZNER. (m/n)
b.26-74	SAMUEL WEISMAN-Filed Memo-endorsed on Notice of Motion dtd 11/2/73 --Motion for a Bill of Particulars Granted in part and denied in part--Motion for Discovery and Inspection granted and denied in part - So ordered - Metzner, J. (m/n)
b.26-74	STEPHEN ADLMAN - Filed Memo endorsed on Notice of Motion dtd. 11/21/73 -- Motion for Bill of Particulars denied in part and granted in part; Miscellaneous Motions granted in part and denied in part. Item 21 which requests a severance will be disposed of in a separate memorandum - so ordered - METZNER,J.(m/n)
b.26-74	ROBERT SANTIS-Filed Memo-endorsed on Notice of Motion dtd 11/21/73 - Motion for Discovery and Inspection granted in part and denied in part. Motion for Brady Material - The govt. shall apprise the movant of the existance of any such material as soon as it is aware of its existence. Motion for deverance will be disposed in a separate memorandum; Motion to Inspect Grand Jury Minutes - denied; Motion to discover Grand Jury witness denied; Motion for Discovery of Trial Witness granted; Motion to Discover all promises to Witnesses is granted on consent; Discovery of Criminal Records is denied Discovery of Exhibits before the Grand Jury is granted as consented to by the government. Motion to Discover Electronic Surveillance is denied; Motion for Bill of Particulars denied in part and granted in part - So ordered Metzner, J. (m/n)
eb.26-74	STEPHEN ZARDUS - Filed Memo-endorsed on Motiod dtd.11/21/73 -- Motion to Suppress denied; Motion to Discover Electronic Surveillance denied; Motion to Discover Brady Material is granted to the extent that the govt. is aware of its obligation etc.; Motion for Discovery & Inspection is granted; Motion for Bill of Particulars granted in part; and denied in part/ So ordered - Metzner,J.(m/n)
.26-74	STEPHEN HAGLER-Filed Memo-endorsed on Motion dtd 11/29/73 -- Motion for Discovery granted in part and denied in part. Motion for Bill of Particulars Denied in part and granted in part - So ordered - Metzner, J. (m/n)
5-74	Filed Affidavit for Writ of Habeas Corpus Ad Prosequendum Deft. Martin I. Roth.

DATE	PROCEEDINGS
Feb.26-74	THEODORE KOSS -- Filed memo endorsed on Motion dtd 10/18/73 -- Motion for Bill of Particulars denied in part - granted in part; Motion for Discovery-Denied; Motion to Inspect Exculpatory Evidence - The govt. shall apprise the movants of the existence of such material as soon as it is aware of it. Motion for Severance will be disposed of in a separate memorandum. Motion to inspect Grand Jury Minutes denied/ - So ordered Metzner, J. (m/n)
Mar-7-74	Filed Governments supplemental Bill of Particulars (all defts)
Mar.12-74	Filed Government's Memorandum of Law in opposition to Koss Defts' Supplemental Aff
Mar.12-74	Filed OPINION #40445 - The Motions by Eleven Defts. for Severance is Denied, for reasons indicated, without prejudice to renewal if the proceedings at trial justify such action. The defts. Anfang and Schwartz have also moved for a severance on the ground that a lengthy joint trial will cause them severe financial hardship possibly resulting in the loss of their employment. This is not a sufficient basis for severance. Defts. Adlman, Schwartz and Santis have each moved for a severance on the ground that it will be necessary for them to call various co-defendants to testify in their behalf. Motions are denied without prejudice for renewal. Motion of Deft. Santis for a severance on the additional grounds is also denied. Deft. Roth asks for a severance on the groun that he may elect not to testify at trial. The jury will be instructed as it always is that guilt is personal and that no inference is to be drawn from d failure to take the stand. Motions of Roth and Koss in re: prejudiced; Denied. Motion of Deft. Koss in re: statements of co-defendants; denied. Deft. Weisman's motion for severance on medical grounds: The government concurs in the court's expressed views that the deft. shall be examined by a physician appointed by the court, and a separate order will be entered to that effect. Deft. Koss has moved for a severance of the perjury counts twelve and thirteen. The motion to sever counts twelve and thirteen is granted. So ordered-METZNER,J. Deft.Roth
Mar.12-74	Filed/memo-endorsed on a Notice of Motion dtd 11/27/73 -- This motion is disposed o in accordance with the opinion filed today in the Companion motion. So ordered, METZNER, J. (m/n)
Mar.12-74	Filed for Shargel - Anfang, Memo-endorsed on Notice of Motion dtd. 11/23/73-- This motion is disposed of in accordance with the opinion filed today in the companion motion. So ordered - METZNER,J.(m/n)
Mar.20-74	Filed one envelope sealed by order of the court and shall not be opened until further order of this court(envelope containe govt. affdt.).So ordered,Metzner,J.
Mar-20-74	STEPHAN ZARDUS - Filed consent to substitute Attorney Irwin Rochman, 230 Park Av., N.Y. - Metzner,J.
Mar-22-74	THEODORE KOSS & KOSS SECURITIES CORP. - Filed ORDER - authorizing Morris Weinsberg to take from file the exhibits described "EXHIBITS ANNEXED TO SUPPLEMENTAL AFFIDA and to deliver original exhibits to U.S.Atty.S.D.N.Y. - Metzner,J.
Mar-25-74	DAN ANFANG (with his atty.) withdraws his plea of Not Guilty and PLEADS GUILTY to to Count 3. Plea accepted. Pre-centence report ordered. Sentence May 6, 1974 Bail continued - METZNER, J.
Mary26-74	IRWIN HYMAN (with his atty. present) withdraws his plea of not guilty and PLEADS GUILTY to Count 1. Plea accepted. Pre-sentence report ordered. Sentence May 6, 1974. Bail continued - METZNER,J.

DATE	PROCEEDINGS
5-74	STEVEN ADLMAN (with his atty. present) withdraws his plea of not guilty and pleads GUILTY to count 1. Plea accepted. Presentence report ordered. Sentence May 6, 1974. Bail continued - METZNER,J.
7-74	HERBERT SHULMAN (with his atty. present)withdraws his plea of not guilty and pleads GUILTY to count 3. Plea Accepted. Presentence report ordered. Sentence May 6, 1974. Bail continued. - METZNER,J.
7-74	STEPHEN ZARDUS (with his atty. present) Withdraws his plea of not guilty and pleads GUILTY to count 4. Plea accepted. Presentence report ordered. Sentence May 6,1974. Bail continued. Bail to include Florida and the Southern District of New York-METZNER,J.
8-74	SAMUEL WEISMAN - Filed CJA 21 Authorization of Alvin S. Teirstein,M.D. 70 E.90th St. N.Y.10028 - Metzner, J. (original mailed to A.O. Wash.D.C.)
8-74	SAMUEL WEISMAN - Filed CJA 21 approving payment on above. - Metzner,J.
28-74	THEODORE KOSS - Filed Affdavit in support of application to appoint Morris Weissberg atty.
28-74	THEODORE KOSS & KOSS SECURITIES CORP. _ Filed Affidavit in support of application for appoi ment of counsel for defts.
29-74	THEODORE KOSS & KOSS SECURITIES - Filed CJA Appointment of Morris Weissberg. 15 Park Row, N.Y - Metzner, J.
29-73	Filed Government Order and Affidavit for an order that Counts 12 & 13 of the Indictment in the above matter be tried separately from Cts. 1 thru 11, and this Court having granted such motion by Order dtd 3/12/74 and the Govt. having moved for reconsideration with respect to Ct.13 of the Indictment herein, and this Court have reconsidered the matter , and defts. not having objected. It is hereby ordered that the motion for a trial of Ct.13 of the Ind. herein separate from Cts. 1 thru 11 is denied. METZNER.J.
29-74	Filed Govt. ORDER that Deft. Samuel Weisman having moved for severance in matter, and this Court having granted such motion w/o opposition by Govt. and Govt. moved for severance of Deft. Harold Lassoff and joint trial of defts Lassoff & Weisman, it is ORDERED The Govt's motion for severance of Deft. Lassoff and a joint trial of defts is granted - METZNER,J.
-74	Filed Government - Third Supplemental Bill of Particulars.
5-74	Filed defy. MARTIN ROTH request to charge.
.5-74	Filed pltfs. 4th supplemental bill of particulars.
-74	STANLEY SCHWARTZ (atty. present) withdraws his plea of not guilty and pleads GUILTY to Count 2. Plea accepted. Presentence report ordered. Sentence May 6, 1974 - Bail continued - METZNER, J.
10-74	IRA LEE SORKIN - Filed Affidavit for Writ of Habeas Corpus Ad Prosequendum

U.S.A. V. KOSS 73 Cr. 903 METZNER,J.

DATE	PROCEEDINGS
4-17-74	Filed the enclosed affidavit was submitted by the government pursuant to the court' direction that it explain why it would not divulge the names of witnesses. The court has read the affidavit and finds it sufficient to support the government's position. This affidavit shall be sealed and delivered to the Clerk of the court not opened until further order of the court. So ordered. METZNER, J.
4-17-74	Filed Government Affidavit for the purpose of clarifying Count 13 of Ind. for defts. Theodore Koss & Koss Securities Corp.
4-17-74	Filed Govt. Second Supplemental Bill of Particulars.
4-15-74	ROBERT PHILIP SANTIS indicted as ROBERT SANTIS - Withdraws plea of not guilty and PLEADS GUILTY (atty. present) to count 2 only. Presentence investigation ordered. Sentence adjd. to May 6, 1974 and to be referred to Judge Metzner. Bail continued ($20,000 P.R.B.) WEINFELD, J.
4-16-74	ROBERT KOLBERT with his(atty. present) withdraws his plea of not guilty and PLEADS GUILTY to count 1 only. Plea accepted. Presentence report ordered Sentence May 6, 1974. Bail continued - METZNER, J.
4-17-74	MARTIN ROTH (atty present)withdraws his plea of not guilty and PLEADS GUILTY to Count 3 only. Plea accepted. Sentence 5/6/74. The defendant was produces in Court on a Writ of Habeas Corpus ad Prosequendum. Writ adjourned to 5/6/74 METZNER,J.
4017-74	Jury emplaned and sworn. Crial begun as to Theodore Koss-Koss Securities-Erwin La William McGee-Stephen Hagler and severed as to Samuel Weisman and Harold Lasoff. Deft. Erwin Layne produced in Court on a Writ of H.C.ad Prosequendum-Metzner,J.
4-18-74	Trial Continued.
4-25-74	Filed CJA 21 - (WILLIAM McGEE) Authorizing Transcript (original mailed to AO Wash.I Metzner,J.
4-25-74	ERWIN LAYNE - Filed CJA 21 Approving payment of Authorization of Transcript - Metzner,J.
4-19-74	Trial continued - Juror #11 is replaced by Alt. Joror #1 - METZNER,J.
4-22-74	Trial continued - METZNER,J.
4-23-74	Trial continued - Juror #5 is replaced by Alt. Joror #2 - METZNER,J.
4-24-74	Trial continued - METZNER,J.
4-25-74	Trial continued - METZNER,J.
4-26-74	Trial continued - METZNER,J.
4-29-74	Trial continued - METZNER,J.
5-6-74	Trial continued. The court directs that alternate Juror Howard Perry is excused f any further Jury service - METZNER,J.
5-7-74	Govt. rests. The Govt. consents to strike the following from the means of conspir as to Koss and Koss Security 21(a), 21(H) 21(J) 21(L) 21(N). Defts. Koss and

Continued on page 7-74

D. C. 109 Criminal Continuation Sheet

DATE	PROCEEDINGS
	Koss Securities move to dismiss counts 6, 7, 9 and 10 - Granted. all other motions are denied. METZNER,J.
13-74	STANLEY SCHWARTZ - Filed JUDGMENT (atty present) It is adjudged that the imposition of sentence is suspended and the defendant is placed on probation for a period of TWO(2)YEARS, subject to the standing probation order of this Court. The defendant is fined the sum of $1,500.00 to be paid within SIX(6)MONTHS from the date of this order or the defendant is to be committed until the fine is paid or he is otherwise discharged according to law. Counts (1)(2)(8)(9)(10) and(11) are dismissed on motion of the defendant's counsel with the consent of the Government - METZNER, J. (copies issued) (see entry on 5-30-74)
13-74	DAN ANFANG - Filed JUDGMENT(atty present) It is adjudged that the imposition of sentence is suspended and the defendant is placed on probation for a period of THREE(3)YEARS subject to the standing probation order of this court. Counts (1)(8)(9)(10)and (11) are dismissed on motion of defendant's counsel with the consent of the Government. METZNER,J. (copies issued) (see entry on 5-30-74)
13-74	HERBERT SHULMAN - Filed JUDGMENT (atty present) It is adjudged the imposition of sentence is suspended and the defendant is placed on probation for a period of TWO(2)YEARS subject to the standing probation order of this Court. The defendant is fined the sum of $1,500.00 to be paid within SIX (6) MONTHS from the date of this order or the defendant is to be committed until the fine is paid or he is otherwise discharged accoriding to law. Counts (1)(5)(6)(7)(8((9)(10)and (11) are dismissed on motion of defendant's counsel with the consent of the Government. METZNER,J. (copies issued)
7-74 al 'd-	Govt. rests. The Government consents to strike the following from the means of conspiracy as to Koss and Koss Securities. 21(a). 21(h). 21(j). 21(L). 21(n). Defendants Koss and Koss Securities move to dismiss counts 6,7,9 and 10 granted all other motions are denied. Counts #5,6,7,8,9,10 dismissed as to defts MC GEE AND HAGLER Counts 6,7,9,10 dismissed as to LAYNE
-74	Trial continued
-74	Trial continued
0-74	Trial continued and concluded Jury verdict 3:15 P.M. Deft. Koss GUILTY on counts 1,2,3,4,5,8,11 and 13. All motions to be submitted on paper. Presentencr report ordered. Sentence June 14, 1974. Bail continued. Jury Polled. Deft. KOSS SECURITIES CORP. GUILTY on counts 1,2,3,4,5,8, and 11. All motions to be submitted on papers. Presentence report ordered. Sentence June 14, 1974. Bail continued. Jury Polled. Deft. WILLIAM McGEE GUILTY on counts 1,3, and 11. All motions to be submitted on papers. Presentence report ordered. Sentence June 14, 1974. Bail continued. Deft. IRWIN LAYNE GUILTY on counts 1,3,5,8 and 11. All motions to be submitted on papers. Presentence report ordered. Sentence June 14, 1974. Writ satisfied
0-74	Deft. STEPHEN HAGLER NOT GUILTY on counts 1,3, and 11. Deft. moves to be exonerated from bail, motion granted. - METZNER,J.
6-74	Filed Transcript of record of proceedings dtd 4/2/74
4-74	Filed LAYNE-Writ of Habeas Corpus Ad Prosequendum w/Marsha l return -- Writ Satisfied -METZN

(next page)

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DATE	PROCEEDINGS
May 22-74	Filed CJA 20 Appointment of Julius Wasserstein, Esq., 26 Court St., Bklyn, N.Y. (original mailed AO Wash.D.C.)
May 22-74	ROBERT SANTOS - Filed JUDGMENT (atty.present) It is adjudged that the imposition of sentence is suspended and the defendant is fined the sum of $3,000.00 and placed on probation for a period of TWO(2)YEARS subject to the standing probation order of this Court. Condition of probation being that the defendant pay the fine within his period of probation or the defendant is to stand committed until the fine is paid or he is otherwise discharged according to law. Counts 1,3,5,thru 11, are dismissed on motion of the defendant's counsel with the consent of the Government _ METZNER,J. (copies issued)
5-29-74	ADLMAN, Steven - FILED JUDGMENT (atty. present) It is adjudged that the imposition of sentence is suspended and the defendant is placed onprobation for a period of THREE (3) YEARS subject to the standing probation order of this Court Counts (3)(5)thru(11) are dismissed on motion of deft's counsel with the consent of the Government - METZNER,J. (copies issued)
5-29-74	MARTIN ROTH - produced in Court on a writ, with atty for sentencing. Filed JUDGMENT (atty.present) It is adjudged that the imposition of sentence is suspended and the defendant is placed on probation for a period of THREE(3)YEARS to commence upon completion of the sentence imposed on 3/9/73 by JUDGE GAGLIARDI in Indictment 72 Cr.485. Counts (1)(5)thru(11) are dismissed on motion of defendant's counsel with the consent of the Government. Writ Satisfied. METZNER,J. (copies issued)
5-30-74	ROBERT KOLBERT - Filed JUDGMENT(atty present) It is adjudged that the imposition of sentence is suspended and the defendant is placed on probation for a period of THREE(3)YEARS subject to the standing probation order of this Court on Count 1. Special condition of probation, (1) that the defendant enter and remain 8in a psychiatric program to be selected by the Probation Department and (2) that the defendant obtain gainful employment within ONE(1)MONTH from the date of this order. Counts (3)(5)thru (11) are dismissed on motion of the defendant's counsel with the consent of the Government(METZNER,J. (copies issued)
5-30-74	Defts. STANLEY SCHWARTZ and DAN ANFANG - Let the record show that all counts (5) thru (11) are dismissed - METZNER,J.
Jun 5-74	Filed one sealed enveloped containing a transcript of May 30,1974. This envelope shall be sealed and delivered to the Clerk of the Court and not opened until further order of the court. So ordered,Metzner,J. (Cashin)
6-6-74	HYMAN - Filed JUDGMENT(atty.present)It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representativ for imprisonment for a period of TWO(2)YEARS on count (1) pursuant to Section 36 of Title 18, United States Code, as amended with provisions that the deft. be confined in a JAIL TYPE INSTITUTION for a period of THREE (3)MONTHS As the provided in the aforesaid said section. The execution of the remainder of the prison sentence is suspended and the defendant is placed on probation for a period of TWO(2)YEARS subject to the standing probation order of this Court. The defendant is to surrender on June 13, 1974 at 10AM in the United States Marshal's office. Bail is continued pending surrender. Counts (3) and (5) thru (11) are dismissed on motion of the Defendant's counsel with the consent of the Government. - Metzner,J. (copies issued)

TE	PROCEEDINGS
74	THEODORE KOSS & KOSS SECURITIES CORP. - Filed Motion for New Trial and Memorandum in support of Motion for a New trial [illegible] R.C.P.
2-74	MARTIN ROTH - The enclosed transcript of proceedings dated 5/29/74 is sealed and is to be delivered to the Clerk of the Court and not opened until further order of the Court So ordered - METZNER, J.
2-74	ADLMAN - The enclosed transcript of proceedings dated 5/29/74 is sealed and is to be delivered to the Clerk of the Court and not opened until further order of the Court So ordered - METZNER,J.
-74	WEISMAN & LASSOFF - Filed Order to Show Cause, returnable June 10 at 10A.M. why an Order should not be entered herein severing the trial of deft. - Metzner, J.
-74	Filed Memo-endorsed re:above Order - Motion granted to the extent of adjourning the trial to October 7, 1974 - So ordered - METZNER, J.(m/n)
-74	IRWIN HYMAN - Filed Notice of Appeal re: Judgment and sentence imposed on 6/6/74 to U.S.C.A. Second Circuit/
-74	WILLIAM P. McGEE - Filed Personal Recognizance Bond w/o security sum of $15,000.00
-74	THEODORE KOSS - Filed Unsecured Personal Recognizance Bond Pending appeal sum of $25,000.
-74	Filed Notice of Motion for Deft. Layne for an order seeking relief as indicated
-74	Filed Govt's Memorandum of Law in opposition to the Motion of Deft. Theodore Koss for a New Trial.
-74	Filed Medical Report from Meyer Texon re: Samuel Weisman
74	Filed commitment & entered return, Deft. delivered to Warden Fed Det Hdqtrs 6-13-74
74	Filed Writ of Habeas Corpus Prosequendum - Writ Satisfied - 6/14/74 - Metzner,J.
-74	WILLIAM McGEE - Filed JUDGMENT (atty present) It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) MONTHS on count One(1). Imposition of sentence on counts (3) and (11) are suspended and the defendant is placed on probation for a period of TWO(2) YEARS to commence upon expiration of sentence on Count 1 and subject to the standing probation order of this Court. It is adjudged that the defendant is continued on present bail and to post new bail pending appeal - METZNER,J. (copies issued)
74	THEODORE KOSS - (atty. present) Filed JUDGMENT It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of One(1) Year on Count 1. Imposition of sentence is suspended on the remaining counts and the defendant is placed on probation for a period of Three(3) Years to commence upon expiration of sentence on count One and subject to the standing probation order of this Court. The defendant is continued on present bail and to post new bail pending appeal - METZNER,J. (Copies issued)
4	KOSS SECURITIES CORP. - Filed JUDGMENT (atty presen) It is adjudged that the defendant is fined the sum of $1,500.00 on count One. The fine is to be paid within Thirty (30) Days from the date of this order. Imposition of sentence is suspended on the remaining counts METZNER,J.(copies issued)

DATE	PROCEEDINGS
	#74,531
6-14-74	STEPHAN ZARDUS - Filed JUDGMENT (atty Present) It is adjudged that the imposition of sentence is suspended and the defendant is placed on probation for a period of (2) Years on count 4 and a fine of $1,000.00. The fine is to be paid within (3) months from the date of this order. Probation is subject to the standing probation order of this Court. Counts (1)(2)(3)(5) thru (11) are dismissed on motion of defendant's counsel with the consent of the Government. Metzner, J. (copies issued)
6-14-74	ERWIN LAYNE - Filed JUDGMENT (atty present) It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ONE YEAR on count (1) to commence on Dec.1,1974 Imposition of sentence on the remaining counts is suspended and the defendant is placed on probation for a period of THREE YEARS subject to the standing probation order of this Court to follow completion of the sentence imposed by Judge L. W. Pierce in 72 Cr. 859 on 6/28/73 here in the Southern District of New York Writ satisfied - METZNER, J. (copies issued)
6-18-74	IRWIN HYMAN - Filed memo endorsed on deft's letter dtd 6/7/74 -- I will treat the attached letter as a motion for reduction of sentence. I have reviewed the file in the case and find that the motion must be denied - So ordered-Metzner, J. (m/n Pro se)
6-18-74	Filed Transcript of record of proceedings, dated Apr. 17, 18, 19, 22, 23, 24, 1974
6-18-74	Filed Transcript of record of proceedings, dated May 6, 7, 8, 9, 10, 1974
6-18-74	Filed Transcript of record of proceedings, dated Apr 25, 26, 29, 30, 1974
6-19-74	ERWIN LAYNE - Filed CJA 21 Authorization of Transcript S.D.C.R., - METZNER, J.
6-19-74	WILLIAM McGEE - Filed CJA 21 Authorization of Transcript S.D.C.R., METZNER, J.
6-25-74	IRWIN LAYNE - Filed Notice of Appeal - appealing from the Judgment of conviciton on 6/14/74
6-24-74	THEODORE KOSS & KOSS SECURITIES CORP. ET AL. - Filed Notice of Appeal from the final Judgment entered on 6/14/74
6-24-74	Filed Memo and Order -- The application to proceed on appeal in formampauperis is denied on the basis that the deft's financial condition does not justify such relief. So ordered - METZNER, J.
6-24-74	WILLIAM McGEE - Filed Notice of Appeals from final judgment imposed on 6/14/74
6-26-74	Layne Filed commitment & endorsed return, Deft delivered to Warden Danbury, Conn 6-24

CHARGE TO JURY

UNITED STATES OF AMERICA

vs 73 Cr 903

THEODORE KOSS et al.,

Defendants

New York, N. Y.

May 9, 1974

CHARGE OF THE COURT

THE COURT: (Metzner, D. J.) Mr. DiGiacomo, ladies and gentlemen of the jury:

We have now reached the point in this trial where you are about to enter into your final function as jurors, which is, of course, one of the sacred duties of citizenship. You have given careful attention to the evidence during the course of the trial, and I am certain that you will conduct your deliberations in the same fine spirit that you have so far displayed and with impartiality and fairness reach a just verdict in this case.

In our court system, the functions of the Judge and the functions of the jury are clearly defined. It is my duty to instruct you as to what the law is. It is your duty to accept the law as I state it to you.

Just as I am the exclusive judge of the law, so you are the exclusive judges of the facts. You alone determine

the credibility of the witnesses and the weight, effect and value which should be given to their testimony.

It is up to you to determine from the evidence which you have heard what the facts are in this case and from those facts decide whether a defendant has violated the law.

This is a criminal prosecution, in which the Government is one party and the defendants are the others. The fact that the Government is a party entitles it to no greater and no lesser consideration than any other party. It is entitled to the same consideration as given to the defendants -- no more and no less.

This case must be decided within the scope of the charges against the defendant as contained in the indictment, but before discussing the law applicable to the charges of the indictment, let us consider some general principles which apply in every criminal case.

An indictment itself is not evidence. It merely describes the charges made against the defendants and may not be considered by you as evidence of the guilt of the defendants. Nor can the fact that a grand jury has found this indictment in any way detract from the presumption of innocence with which the law surrounds a defendant unless and until his guilt is proved beyond a reasonable doubt.

The charges against all of the defendants in Counts

6, 7, 9 and 10 have been withdrawn from your consideration, and the charges against William McGee and Stephen Hagler in Counts 5 and 8 have likewise been withdrawn from your consideration. These dispositions should not be considered or discussed by you or influence you in any way in passing upon the guilt or innocence of any of the defendants on the counts in the indictment which are being submitted to you for your determination.

Each of the eight counts which you will consider alleges the commission of a separate and distinct offense. It will be necessary for you to reach a verdict of guilty or not guilty as to each of the defendants **separately on each of** the counts in the indictment in which he or it is named. You must consider and weigh the evidence separately as to each defendant in each count.

The fact that you may find one of the defendants guilty or not guilty of one of the offenses charged should not control or influence your verdict with respect to any other offense of which the defendant may be charged or with respect to a charge against any other defendant.

Similarly, the fact that other persons named in the indictment may have pled guilty to the charges in the indictment is not evidence of the guilt of the defendants on trial here, and those pleas of guilty may not be considered

by you in any respect in passing upon the guilt or innocence of the defendants on trial.

In addition, the fact that some of the defendants named in the indictment did not testify and are not on trial should not in any way enter into your deliberations on the question of the guilt or innocence of the five defendants who are standing trial now.

As you have learned from the testimony, Michael Hellerman, Murray Taylor, Murray Levine and Robert Angona were not indicted by the grand jury but were named only as co-conspirators. The reasons why these persons were not indicted must play no part in your deliberations, except insofar as it may be considered by you on the issue of the credibility of such witnesses who have testified on behalf of the Government.

Whether persons who may be involved with others in alleged criminal conduct should be indicted is a matter solely within the discretion of the grand jury. It should be obvious, therefore, that because someone is or is not indicted has, on its face, no connection with the guilt or innocence of someone else who is indicted. Thus, you may draw no inference, favorable or unfavorable either to the Government or to the defense, by reason of the fact that certain persons were merely named as co-conspirators.

Each defendant has denied the charges in the indictment. By his plea of not guilty, each defendant has put into issue every material fact alleged in the accusations brought against him. Accordingly, the Government, having made the charge, has the burden of proving beyond a reasonable doubt each material element of each count of the indictment. This rule applies to each defendant individually as to each of the counts in the indictment in which he is named. This burden of proof never shifts. It remains with the Government throughout the entire trial and during your deliberations as jurors.

The defendant does not have to prove his innocence. He is presumed to be innocent, and this presumption is overcome only when you reach a conclusion from the evidence that his guilt has been established beyond a reasonable doubt.

Now, what is meant by "reasonable doubt"? There is nothing mysterious about the term. It means, as the words themselves indicate, a doubt based upon reason and common sense, which arises after consideration of all the evidence.

Reasonable doubt is a doubt which would cause reasonable persons to hesitate to act in matters of importance to themselves. It is not a vague, speculative, imaginary something, and a person may not be convicted on mere suspicion

or conjecture.

On the other hand, a reasonable doubt does not exist merely because a juror does not wish to perform an unpleasant duty.

A reasonable doubt may arise not only from the evidence produced but also from the lack of evidence. A defendant may also rely upon evidence brought out on cross-examination of any of the witnesses who have testified on behalf of the Government. He may attempt to raise a reasonable doubt in your mind as to the existence of one or more of the essential elements of the crime without affirmatively presenting his version of all or any of the facts. This is so because the law does not impose upon a defendant a duty to produce any evidence.

The law does not compel a defendant to take the witness stand and testify, and no presumption of guilt may be raised and no inference of any kind may be drawn from the failure of a defendant to testify.

Now, it is not necessary for the Government to prove the guilt of a defendant beyond any possible doubt. Proof is usually not a matter of mathematical or absolute certainty. In the nature of things, it cannot be. But to sustain a conviction there must be such proof as satisfies your reason as intelligent people beyond any reasonable doubt

that a defendant is guilty as charged.

If you do not have any reasonable doubt of a defendant's guilt as to the material elements of a charge, then you should return a verdict of guilty on that count. If, on the other hand, you do have a reasonable doubt of a defendant's guilt as to any of the material elements of the crime charged, then you must return a verdict of not guilty as to that count.

If the evidence is susceptible of two interpretations each of which appears to you to be reasonable and one of which points to the guilt of the defendant and the other to his innocence, it is your duty under the law to adopt that interpretation or conclusion which would admit of the defendant's innocence and reject that which points to his guilt.

As you know, the charges in this case center on the alleged violations of the Federal securities laws, which were enacted by the Congress to protect the investing public in the purchase and sale of stocks and securities that are publicly distributed. The defendants are charged with violating and conspiring to violate the Securities Act of 1933, the Securities Exchange Act of 1934 and, in addition, the mail fraud statute enacted by Congress.

Congress enacted the Securities Act of 1933 to

provide for full and fair disclosure of all matters affecting stock being offered for sale to the investing public. The Securities Exchange Act of 1934 was enacted to regulate the national exchanges and the over-the-counter markets.

The first count of the indictment which you will consider is the conspiracy count. This count charges that from on or about November 1, 1970 up to and including September 25, 1973, the date of the filing of the indictment, Theodore Koss, Koss Securities Corporation, Stephen Zardus, Robert Santis, Herbert Shulman, Stephen Adlman, Robert Kolbert, Stanley Schwartz, Samuel Weisman, Harold Lassoff, Martin Roth, Erwin Layne, Irwin Hyman, William McGee, Stephen Hagler and Dan Anfang unlawfully, wilfully and knowingly conspired with each other and with Automated Information Systems, Michael Hellerman, Murray Taylor, Murray Levine, Robert Angona, Interstate Equity Corporation and Atlantic Securities and other to the grand jury known and unknown to violate Section 17(a) of the 1933 act and Section 10(b) of the 1934 act, and Rule 10b-5 of the Securities and Exchange Commission and Section 1341 of Title 18 of the United States Code.

The latter section prohibits the use of the mails in connection with any scheme to defraud.

Section 17(a) makes it a crime for any person, in the course of the sale of securities, to employ any scheme

or device to manipulate the price of such securities or to engage in a course of business which would operate as a fraud upon the purchase of such securities, and this includes the omission to state a material fact necessary to make the statements not misleading.

Section 10(b) and Rule 10b-5 prohibit the same course of conduct in connection with the purchase of such securities.

I will describe each of these Federal laws in more detail later on in this charge when I discuss the substantive counts of the indictment which charge the defendants with actual violations of these laws.

In essence, Count 1 charges that the defendants on trial, Theodore Koss, Koss Securities, Erwin Layne, William McGee and Stephen Hagler, conspired with other defendants not on trial and co-conspirators and among themselves to defraud brokers and individual investors in connection with the sale and purchase of the stock of Automated Information Systems, Inc.

Count 1 alleges the means whereby it is claimed the defendants and co-conspirators would carry on the conspiracy. The alleged means are as follows:

1. In or about January and February of 1971, defendants Stephen Zardus, Robert Santis and Theodore Koss agreed that co-conspirators Murray Taylor and Michael Hellerman would supply defendant Stephen Zardus with the names of subscribers

and the moneys to purchase 50,000 shares of common stock of co-conspirator Automated Information Systems, Inc.

2. Defendant Robert Santis and co-conspirator Michael Hellerman agreed that defendant Robert Santis would pay to co-conspirator Michael Hellerman approximately one half of the proceeds of the underwriting.

3. In or about February 1971 and March 1971, defendants Martin Roth and Erwin Layne and co-conspirators Michael Hellerman and Murray Taylor and other signed stock powers for several certificates issued in the names of subscribers supplied to defendant Stephen Zardus by co-conspirator Michael Hellerman.

4. In or about March and April 1971, defendants Theodore Koss, Koss Securities Corporation and Herbert Shulman and others traded the common stock of Automated Information Systems, Inc., in the over-the-counter market, while defendant Stephen Zardus and co-conspirators Michael Hellerman and Murray Taylor and Interstate Equity Corporation were selling common stock of Automated Information Systems, Inc., through co-conspirator Interstate Equity Corporation.

5. In or about March and April 1971, defendants Theodore Koss and Koss Securities Corporation purchased shares of the common stock of Automated Information Systems, Inc., from their customers and placed the shares in the firm account.

Said shares were purchased from these customers below the prevailing market price.

6. In or about April 1971, defendants Herbert Shulman, Stephen Adlman and Robert Kolbert met and agreed with co-conspirator Michael Hellerman that defendants Herbert Shulman, Stephen Adlman and Robert Kolbert would trade and recommend to brokers and investors that they purchase the common stock of co-conspirator Automated Information Systems, Inc.; defendants Herbert Shulman, Stephem Adlman and Robert Kolbert received cash payments.

7. In or about April, May and June 1971, defendants Martin Roth and Erwin Layne and others endorsed checks drawn against the account of Interstate Equity Corporation in the names of persons unknown to them; said checks were then delivered to co-conspirator Michael Hellerman, who cashed said checks.

8. In or about June 1971, defendants William McGee and Stephen Hagler received cash payments for recommending and influencing others to purchase the common stock of Automated Information Systems, Inc.

Now, what is a conspiracy? It is a combination or agreement of two or more persons by concerted action to accomplish a criminal or unlawful purpose, and one or more of the persons who are members of the conspiracy does any act to effect or further the object of the conspiracy.

It is a partnership in criminal purpose, in which each member becomes the agent of every other member, and it is a crime in itself.

To prove a conspiracy here, the evidence must show beyond a reasonable doubt the existence of each one of the following material elements:

First, that the conspiracy described was formed and existing at or about the time alleged:

Second, that it was part of the conspiracy to do any one of the following:

(1) that the defendants and co-conspirators unlawfully, wilfully and knowingly, in the offer to sell and sale of securities, to wit, the common stock of Automated Information Systems, Inc., by the use of means and instruments of transportation and communication in interstate commerce and by use of the mails, would violate Section 17(a), to which I have already referred:

(2) that the defendants and co-conspirators in connection with the purchase and sale of securities, to wit, the common stock of Automated Information Systems, Inc., would and did directly and indirectly, use means and instrumentalities of interstate commerce and the mails, to use and employ manipulative and deceptive practies and contrivances in contravention of Rule 10b-5 of the rules and regulations promulgated by the Securities & Exchange Commission;

(3) that the defendants and co-conspirators, having devised and intending to devise a scheme and artifice to defraud, and attempting so to do, would place and cause to be placed in Post Offices and authorized depositories for mailed matter and would cause to be delivered by mail, according to the direction thereon, certain matter to be sent and delivered by the Post Office Department.

The third material element which you must find beyond a reasonable doubt is that a defendant knowingly and wilfully became a member of the conspiracy.

Fourth, that one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment at or about the time alleged.

Fifth, that such overt act was committed in furtherance of some object or purpose of the conspiracy as charged.

Now, as to the formation of a conspiracy, it is not necessary that there be proof that the participants met together and entered into a formal or written agreement or that they directly stated among themselves what their object or purpose was to be or the details of the plans or the means by which the purpose was to be achieved. Indeed, it would be extraordinary for the members of a conspiracy to set forth all the actual details of their arrangements in a formal and written document.

When persons in fact embark together upon a conspiracy, much is often unexpressed; much is left to unwritten understanding.

Generally, such a criminal conspiracy is a matter of inference, deduced from the acts and statements of the alleged conspirators.

As far as the first element of this count is concerned, what the evidence must show in order to establish that a conspiracy existed is that the members in some way or other, positively or tacitly, came to a mutual understanding to engage in a common unlawful agreement to violate either the Federal Securities laws or the Federal Mail Fraud Statute.

In determining whether or not there was such an unlawful agreement, you may judge the acts and conduct of each of the alleged conspirators as a whole and the reasonable inferences to be drawn from such evidence. It is not necessary for the prosecution to prove that all the means and methods set forth in the indictment as part of the conspiracy and which I just read to you were actually used or put into operation. It is necessary that the evidence establish beyond a reasonable doubt that one or more of the means or methods described in the indictment was agreed upon to be used in an effort to effect or accomplish some object

or purpose of the conspiracy as charged in the indictment.

The indictment alleges that the conspiracy commenced on or about November 1, 1970 and continued to about September 25, 1973, the date the indictment was filed. The Government, however, is not required to prove that the alleged conspiracy existed over the whole course of time set out in the indictment. It is sufficient if you find at any time within that period all of the elements of the alleged conspiracy have been proved to your satisfaction beyond a reasonable doubt.

The fact that the Government may not have proved that the conspiracy was carried on as early or as long as the indictment alleges is not of any importance so far as the elements of the crime are concerned.

Proof of several separate and independent conspiracies is not proof of the single conspiracy charged in the indictment unless one of those conspiracies proved is the single conspiracy charged in the indictment.

What you must determine as to this first element regarding the formation of the conspiracy is whether the conspiracy charged in the indictment existed between two or more of the alleged conspirators. If you find that no such conspiracy existed, then you must acquit all the defendants on trial here on Count 1.

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In determining whether the alleged conspiracy exists, you may consider what the evidence shows as to changes in personnel and activity. However, you may find a single conspiracy, even though there were changes in personnel or activities during the time of its existence. If you satisfy yourselves beyond a reasonable doubt that the conspiracy as alleged in the indictment existed, then you must determine as to each defendant whether he knowingly and wilfully was an active participant in the unlawful plan with the intention of furthering its objectives.

Mere knowledge of an illegal act on the part of some other co-conspirator is not sufficient. Merely acting in a way which incidentally furthers the purposes of a conspiracy without knowledge that a conspiracy exists does not make a person a member of a conspiracy.

The scope of each defendant's agreement must be determined individually from what was proved as to that defendant.

You may find that a defendant acted knowingly and wilfully if he acted voluntarily and purposely and with specific intent to do something which the law forbids. That is to say, he must have acted with evil motive or bad purpose to disobey or disregard the law and not because of negligence, mistake, inadvertence or other innocent reason.

It is obviously impossible to ascertain or prove directly what a person knew or intended. You cannot look into a person's mind and see what his intentions were and what he knew; but a careful and intelligent consideration of the facts and circumstances shown by the evidence in any given case as to a person's actions and statements enables us to infer with a reasonable degree of certainty and accuracy what his intentions were in doing or not doing certain things and the state of his knowledge.

Since one of the defendants here is a corporation, it seems appropriate at this point in the charge to mention the subject of a corporation's responsibility for the actions of its officers. Your problem, of course, is to determine whether this corporation has done the things charged in the indictment by virtue of and through the acts of its officer, Theodore Koss.

A corporation is held responsible for the acts and statements of its officers when such acts and statements are performed or made within the scope of the officers' express or apparent authority. It is not necessary for a finding of such authority that the officer be specifically authorized or instructed to commit the particular act or make a particular statement.

Apparent authority is the power an outsider would

normally assume the officer would possess, judging from his position and the general scope of his known functions.

The fact that this corporation is owned and controlled by defendant Koss and his wife may be considered by you in determining Koss' authority to bind the corporation. A corporation is liable for the acts of the officer within his apparent authority, even though his actions may be in violation of the law.

It is not required that each of the conspirators participate in or have knowledge of all of the conspiracy's operations. The guilt of a conspirator is not governed by the extent of his participation. He need not know all of the alleged conspirators. Even if a defendant participated in the conspiracy to a degree less than that of his fellow conspirators or in a relatively subordinate or minor way, he is equally culpable, as long as he became a member of the conspiracy with knowledge of its general scope and purposes.

Nor is it necessary that a defendant receive pecuniary benefit from his participation in the conspiracy, as long as he in fact was a member of that conspiracy.

It is not necessary that all conspirators have participated in the alleged conspiracy from its inception. A person who comes in at a later point with knowledge of

the conspiracy's general operation, although not necessarily aware of all its details, and who intentionally acts in a way to further the unlawful goals becomes a member of the conspiracy and is legally responsible for all that may be or has been done in furtherance of the common criminal objective.

In determining whether or not a particular defendant was a member of a conspiracy, you may consider the evidence of his own acts, statements and conduct, as well as the evidence of the acts, statements and conduct of other alleged co-conspirators and the reasonable inferences to be drawn from such evidence, provided that such acts or statements of a co-conspirator were made during the course of the conspiracy and in aid of or in furtherance of its alleged purposes.

What I have just told you, however, is subject to one limitation. You will recall that on several occasions you were specifically told that certain evidence was admitted solely with respect to the defendant Koss, Koss Securities Corporation or Hagler.

You are instructed to consider such testimony only with respect to these defendants and you must not consider such testimony in the slightest degree in your discussions and deliberations with relation to any other

defendant .

If after considering each defendant separately you find that he was not a member of the conspiracy alleged in the indictment, or is a member of some other conspiracy than the one alleged in the indictment, then you should acquit that particular defendant on Count 1.

Thus it is possible for you to find that none of the defendants, or some of the defendants, or all of the defendants on trial were members of the single conspiracy alleged in the indictment.

The next element that must be proved on this issue of conspiracy is the requirement of an overt act. You may not find a defendant guilty of conspiracy unless you are convinced beyond a reasonable doubt that one of the conspirators knowingly committed one of the overt acts charged in the indictment.

The government need not prove the commission of all of the overt acts charged in the indictment.

By the term "overt act" is meant any act committed by one of the conpirators in an attempt to effect some object or purpose of the conspiracy. It must be knowingly done in furtherance of some object or purpose of the conspiracy charged in the indictment. The overt act need not be criminal in nature if considered separately and apart from the conspiracy. It may be as innocent as

the act of a man walking across the street or using a telephone.

The overt acts referred to in this indictment are:

(a) In or about January of 1971, Robert Santis and Stephen Zardus entered the Plaza Hotel in New York, N.Y.

(b) On or about February 22, 1971, Stephen Zardus entered the Pier 52 Restaurant in New York, N.Y.

(c) On or about March 1, 1971 defendant Robert Santis delivered two cashier's checks payable to Louis Greenblatt.

(d) On or about April 7, 1971, defendant Stephen Zardus and co-conspirator Interstate Equity Corporation purchased approximately 1100 shares of the common stock of co-conspirator Automated Information Systems, Inc., from defendants Theodore Koss and Koss Securities Corporation for the account of Sidonie Horner.

(e) On or about May 25, 1971, the defendant Stephen Adlman sold 2,000 shares of the common stock of co-conspirator Automated Information Systems,Inc.

(f) On or about June 4, 1971 defendant Robert Kolbert purchased 400 shares of the common stock of co-conspirator Automated Information Systems,Inc. for the account of K. Chapman.

(g) On or about June 6, 1971 defendant William McGee received cash.

(h) On or about June 6, 1971 defendant Stephen Hagler received cash.

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(i) On or about June 18, 1971 defendant Erwin Layne had a conversation.

The fact that a particular defendant is not named in an overt act is of no importance because once you find that a conspiracy existed and that a defendant on trial was a member of a conspiracy, then he is bound by the acts done and statements made by any other member in furtherance of that conspiracy, even in the absence of such defendant.

Once you have determined that the offense has been established under the guidelines I have just given you, then the crime of conspiracy is complete as to every person found by you to have been knowingly and wilfully a member of that conspiracy.

Furthermore, at this point the success or failure of the conspiracy to accomplish the common object or purpose is immaterial.

You have listened very attentively to the testimony in this trial. You have just heard counsel for each of the parties summarize for you in their closing statements the testimony or the lack of testimony upon which they relied to support their contentions. Included in these contentions is the attack on the credibility of various witnesses. I see no reason to further detail the contentions of the parties, or the specific proof to sustain these contentions.

The government's witnesses Hellerman, Zardus, Santis, Levine, Adlman and Kolbert admitted from the witness stand that they agreed to engage in an illegal course of conduct to manipulate the price of the stock of Automated Information Systems,Inc. If you believe their story, they were guilty of the crime of conspiracy.

Thus you must first determine if you believe that such an agreement existed among those witnesses. Then the question for you to resolve under this first count of the indictment is whether a defendant on trial was also a member of that conspiracy under the guidelines which I have just detailed for you.

We now come to Count 2 of this indictment. This count charges defendants Theodore Koss and Koss Securities Corporation with having actually violated Section 17(a) of the Securities Act of 1933, as distinguished from merely agreeing to violate that law.

This count involves alleged activities by these two defendants in conjunction with the sale of Automated stock under the offering circular as a new issue prior to March 3, 1971.

In order to find the defendants Koss and Koss Securities Corporation guilty of the charges contained in Count 2, you must be convinced beyond a reasonable doubt

that the following three elements have been proved:

First, that these two defendants, in connection with the offer or sale of Automated Information Systems Stock engaged in a scheme to defraud or to obtain money and property, by making untrue statements of material facts, or by omitting to state certain material facts which should have been made in order to make their statements under the circumstances not misleading.

Second, that the defendant did so knowingly and wilfully.

And third, that the defendant used or caused to be-caused the mails or the telephones in furtherance of the scheme.

Insofar as the first element which must be proved beyond a reasonable doubt is concerned, the language describing this element is largely self-explanatory. This a "scheme" is merely a plan for the accomplishment of an object.

"Fraud" is a term which embraces all the possible means which human ingenuity can devise and which are resorted to by one individual to gain an advantage over another by misrepresentation, false suggestions or by a suppression of the truth.

Consequently, a "scheme to defraud" is merely a plan to obtain money or property or some advantage of value by trick or deceit.

In determining whether there was a scheme to defraud, it is not necessary for the government to prove directly that any of the purchasers or sellers of the stock actually relied on or suffered damages as a result of any false statement or omission made to them. It is enough that such statements or omissions were made, if they were made, in the expectation that they would be relied upon by investors in the course of this scheme.

In arriving at a determination on this element of the crime, you must consider whether it was material to inform the investing public that Hellerman should have been listed as an underwriter in connection with the offering circular, whether the agreement to give Hellerman one half of the proceeds should have been included in the offering circular, and whether there was a failure to maintain a proper escrow account.

A material fact is one to which an average reasonably prudent investor would attach importance in deciding whether or not to buy shares of stock.

Insofar as the second element is concerned--that a defendant must have acted knowingly and wilfully--what I said before in connection with the conspiracy count about the words "knowingly" and "wilfully" applies equally as well to this count.

The third element which must be proved beyond a reasonable doubt is that the defendants used or caused to be used the mails or the telephones in furtherance of the scheme.

Count 2 specifies that the mails were used insofar as this count is concerned in connection with the mailing of checks for the purchase of 2,000 shares of the common stock of Automated on March 2, 1971 addressed to Interstate Equity Corporation.

There has also been testimony in this trial that the telephone was used in connection with many of the transactions.

It is not necessary for the government to prove that a defendant actually placed or received in the mail any of the matters specified in the indictment or used the telephone. It is sufficient for the government to prove that the defendants caused the mailing to be made or the telephone to be used in the ordinary course of business provided that you find that the mailing or telephoning was made in furtherance of the scheme.

Thus, if a defendant knows or could reasonably foresee that his actions would naturally and probably result in the use of the mails or telephones, then he has caused the mails or the telephones to be used.

Count 3 of the indictment charges that each of the defendants on trial before you actually violated Sections 10 (b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission.

This count is directed to the alleged activities of all defendants in the so-called after market, which started after March 2, 1971.

You will recall that the first count of the indictment charges that one of the purposes or objects of the conspiracy was to violate this Section 10(b), as well as Section 17(a), which I have described to you under Count 2.

Section 10(b) of the 1934 Act is almost identical with Section 17(a) of the 1933 Act. However Section 17(a) refers only to the sales of securities while Section 10(b), which you will consider under this count, covers both purchases and sales of securities.

In order for you to find a defendant guilty under this count, you must be convinced beyond a reasonable doubt of the following three elements:

First, that the defendant in connection with the purchase or sale of Automated stock employed any device or scheme to defraud, or engaged in a course of business which operated or would operate as a fraud or deceit upon any person, or omitted to state a material fact which should have been

made to make the statements under the circumstances not misleading.

Second, that the defendant did so knowingly and wilfully,

And third, that the defendant used or caused to be used the mails or the telephones in furtherance of the scheme.

The explanations of these three elements which I detailed for you under Count 2 of the indictment apply equally as well to this count of the indictment, and, therefore, I will not repeat them for you.

The mailing upon which the government relies for conviction under this count is the confirmation of 500 shares of Automated sent to Bernard Webber on May 3, 1971. In addition, there have been numerous references to the use of telephones in connection with these transactions.

Now, in connection with the charges contained in Count 3, it is not necessary for the government to prove that each defendant personally did each of the acts constituting the essential elements of the crime. This is so because anyone who knowingly aids, abets, communicates, induces or procures the commission of a crime against the United States is punishable as a principal.

The government does not contend that defendants McGee, Layne and Hagler personally employed a scheme or

device to defraud in connection with the purchase and sale of Automated stock. Rather, the government contends that these defendants aided and abetted other persons committing the fraudulent acts charged.

In order for a defendant to aid or abet another to commit a crime, it is necessary that he wilfully associated himself in some way with the criminal venture knowing that the object of this venture was to manipulate the stock of Automated; that he wilfully participate in it as something that he wishes to bring about, and that he wilfully seek by some action of his to make it succeed.

The mere presence of guilty knowledge on the part of a defendant that a crime is being committed is not sufficient to find him guilty unless you are also convinced beyond a reasonable doubt that the defendant was doing something to forward that crime; that he was a participant rather than merely a knowing spectator.

The next count in this indictment is No. 4, but I will defer discussing that count for a moment and proceed to a discussion of Counts 5, 8 and 11.

You will recall that Count 1 alleged that one of the objects of the conspiracy was to violate Section 1341 of Title 18 of the United States Code, which is commonly known as the Federal Mail Fraud Statute.

Counts 5, 8 and 11 of the indictment charge various of the defendants on trial with actually having used the mails or having caused the mails to be used for the purpose of e executing a scheme to defraud purchasers of the stock of Automated Information Systems. The purpose of this statute id to prevent persons from using the United States mails to defraud its citizens.

Each count which you must consider charges a separate violation of this statute. Each count alleges that on or about a certain date the named defendants unlawfully, knowingly and wilfully did devise and scheme to defraud certain purchasers of the stock of Automated Information Systems and to obtain money and property from these persons by means of fales and fraudulent representations, and for the purpose of executing this scheme did cause to be placed in the mail, matter to be sent and delivered by the Post Office.

Specifically, each count refers to a confirmation of purchase of various amounts of shares of Automated stock which had been sent to the purchaser named in that particular count.

Count 5 charges that the defendants Koss, Koss Securities and Layne violated the mail fraud statute when on April 21, 1971 a confirmation of the purchase of 600 shares of Automated was delivered by mail to Jackie Mason.

Count 8 charges that the defendants Koss, Koss Securities and Layne violated the mail fraud statute on June 4, 1971 when a confirmation of the purchase of 400 shares of Automated was delivered by mail to K. Chapman.

And count 11 charges that defendants Koss, Koss Securities Corporation, Layne, McGee and Hagler violated the mail fraud statute on June 11, 1971 when a confirmation of purchase of 200 shares of Automated was delivered by mail to H. Zankel.

In order for you to find a defendant guilty of a particular mail fraud count, you must find beyond a reasonable doubt as to the defendant in question both of the following elements:

First, that the defendant knowingly and wilfully devised or intended to devise a scheme to defraud purchasers of Automated stock by means of false or fraudulent representations as that scheme is outlined in the indictment; and

Second, that for the purpose of executing that scheme a defendant who was a member of the scheme caused in confirmation of purchase named in the particular count to be delivered by mail to the person mentioned in the count on or about the date set forth.

Now, the first element of the offense charged is that a defendant knowingly and wilfully devised or intended

to devise a scheme to defraud, or to obtain money by false or fraudulent pretenses, representations or promises.

The word "false" as used in the indictment means that the claim was untrue when made and was then known to be untrue by the person making it or causing it to be made.

The word "fraudulent" as used in the indictment means that the claim was falsely made or caused to be made with the purpose and with the intent to deceive.

A fraudulent scheme may also exist if there is an intent to deceive and only half truths are used, or there is concealment of material facts.

I have already defined for you under Count 2 what is meant by a material fact. For example, if you find that the facts as contended by the government are true, then you must determine whether it would have been material for an investor in Automated to know that brokers have been paid off to recommend the purchase of the stock, or that the stock had been manipulated because it was all owned by one person, or that one half of the proceeds of the underwriting were to be paid by Santis to Hellerman, with the result that only half of the proceeds would be available for use by Automated in its business.

What I have said previously about the words "knowingly" and "wilfully" and "scheme to defraud" applies

equally as well to these other three counts.

A scheme within the meaning of the mail fraud statute is similar to a conspiracy. Therefore, much of what I have said previously about a conspiracy and membership in a conspiracy in discussing Count 1 applies also to the scheme charged in Counts 5, 8 and 11, and I do not think it is necessary to further elaborate on them.

In order to find that a scheme to defraud existed and that a particular defendant was a member of it, you must be convinced beyond a reasonable doubt that the scheme as described in the particular count in the indictment was formed and existing at the time the confirmation was mailed, and that a defendant knowingly and wilfully was a member of the scheme at that time.

Specifically, Count 5 alleges a mailing of confirmation on April 21, 1971; Count 8 a mailing of a confirmation on June 4, 1971, and Count 11 a mailing of confirmation on June 11, 1971.

The second element in the mail fraud counts to be proved beyond a reasonable doubt is that the mails were used for the purpose of furthering the scheme. You must determine whether the confirmations of purchase referred to in the indictment were delivered by mail to the persons named on or about the date specified, and whether this was caused

by a defendant to further to scheme to defraud.

As I have said before, it is not necessary for the government to prove that a defendant knew or directly participated in these mailings. It is sufficient, if you are convinced beyond a reasonable doubt, that a defendant participated in the scheme to defraud, and that he could have reasonably foreseen that the mails would be used to send these confirmations in furtherance of the scheme even if the mailing was actually done by someone entirely unconnected with the scheme.

Now, coming back to Count 4 of the indictment, it deals only with the defendants Koss and Koss Securities Corporation. Count 4 charges that these two defendants violated Section 15(c)2 of the 1934 Securities Act, and Rule 15(c)2-4 of the Securities and Exchange Commission.

It charges that the two defendants, while participating in an underwriting of the common stock of Automated Information Systems on an all-or-none basis, failed to promptly deposit the monies received from the underwriting in a separate bank account as agent and trustee for the purchasers of such stock.

In order for you to find a defendant guilty on this count, you must be convinced that the following elements have been proved beyond a reasonable doubt:

First, that the defendant participated in the underwriting of the stock of Automated Information Systems;

Second, that the underwriting of this stock was done on an all-or-nothing basis;

Third, that the defendant received monies from the distribution of the Automated stock during this underwriting and knowingly and wilfully failed to promptly deposit these funds in a separate bank account as agent or trustee for the subscribers of these shares.

In regard to the elements of this charge, you will recall from the testimony at trial that an all-or-nothing underwriting is one in which all the stock being offered to the public had to be sold by a certain date or the people who purchased the stock must get their money back.

The offering circular for the underwriting of the Automated stock stated that this was an all-or-nothing distribution and that all of the 65,000 shares in the underwriting had to be sold by March 2, 1971.

Insofar as the third element of this count is concerned, it is for you to determine whether the monies were promptly deposited in a separate bank account.

The definitions of "wilfully" and "knowingly" which I explained to you under Count 1 apply equally as well here.

The last count which you must consider is Count 13 and it is directed solely against the defendant Theodore Koss.

This count charges Koss with a violation of Section 1001 of Title 18 of the United States Code which makes it a crime for any person to make or use any false writing or document knowing the same to contain any false, fictitious or fraudulent entries or statements in connection with any matter within the jurisdiction of any agency or department of the United States.

Specifically, Count 13 charges the defendant Koss with submitting false and fraudulent documents to the Securities and Exchange Commission on June 15, 1971 knowing that such documents contained false and fictitious statements and entries concerning the purchases and sales of the common stock of Automated by Koss Securities Corporation.

In order to find Koss guilty of the charges contained in this count, you must be convinced that the following three elements have been proved beyond a reasonabbe douht:

First, that on or about June 15, 1971 the defendant Koss used documents and writings in matters within the jurisdiction of an agency or department of the United States;

Second, that such writings or documents contained false fictitious or fraudulent statements or entries concerning the purchases and sales of Automated stock by Koss Securities;

Third, that the defendant knew that such writings or documents contained false, fictitious or fraudulent statements or entries.

Insofar as the first element is concerned, I instruct you that as a matter of law, an investigation of violations of the Securities Act of 1933 and the Securities and Exchange Act of 1934 is a matter within the jurisdiction of the Securities and Exchange Commission, which is an agency of the United States Government.

As to the second element, you are to consider only whether the information contained in the blue questionnaire, Exhibit 75, and the trading ledger number 1, Exhibit 76, is false, fictitious or fraudulent. The trading ledger requires information only as to transactions by defendant Koss Securities in the buying and selling of Automated stock for Koss' own account, called here the house account.

The blue questionnaire requires information as to the house transactions, and in addition, transactions by the customers of Koss Securities.

You must determine whether the information contained in those documents was false or fictitious. The word "false" has already been defined for you. The word "fictitious" means that the entry in the book reflects a transaction which actually did not occur.

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In determining the guilt or innocence of a defendant, you must decide that question solely from the evidence you heard from the witness stand and the exhibits that have been placed before you.

The summations of counsel which you have heard are not to be considered as evidence, but only as arguments to you as to what counsel feel you should find from the evidence. In determining the issues in this case, it is your recollection of the testimony that is to control and not that of counsel or of the Court.

If during the course of the trial I sustained an objection by one counsel to a question asked by the examining counsel, you are to disregard the question and any alleged facts contained in that question and you may not speculate as to what the answer would have been.

If a question was asked and an answer given by the witness and I have then stricken the answer from the record, you are to disregard both the question and the answer in your deliberations.

Now, there are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence -- such as the testimony of an eye-witness. The other is indirect or circumstantial evidence, which is proof of a chain of cir-

cumstances pointing to the existence or non-existence of certain facts.

Circumstantial evidence is the proof of facts from which you may reasonably infer a material element of a crime.

Let us take a simple example to illustrate what is meant by circumstantial evidence. We will assume that when you entered the courthouse this morning the sun was shining brightly outside and it was a clear day; there was no rain. Now assume that in this courtroom the blinds are drawn and the drapes are drawn so that you cannot look outside. Assume as you are sitting in this jury box, and despite the fact that it was dry when you entered the building, someone walks in with an umbrella dripping water, followed in a short time by a man wearing a raincoat which is wet.

If you are asked whether it is raining now, you cannot say that you know it directly of your own observation. But certainly upon the combination of facts which I have stated to you, even though when you entered the building it was not raining outside, it would be reasonable and logical for you to conclude that it is raining now.

That's about all there is to circumstantial evidence.

You may draw such inferences as reason and common sense lead you to draw from facts which you find to have been proven. Great care must be exercised when drawing inferences

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from circumstances proved in criminal cases and mere suspicions will not warrant a conviction.

However, no greater degree of certainty is required of circumstantial evidence than is required of direct evidence. It is not on any different or lower plane than direct evidence. The law simply requires that in either case you must be convinced beyond a reasonable doubt of the guilt of a defendant.

In your search for the truth, you must use plain, everyday common sense. You must not be governed by sympathy, bias or prejudice. You have seen the witnesses on the stand and observed their manner of giving testimony. When I refer to witnesses, I, of course, include the defendants who have testified here. How did the witnesses impress you? Did they appear to be testifying frankly, candidly and fairly?

In determining what degree of credit you should give a witness' testimony, you may consider his conduct, his manner of testifying and his interest in the outcome of the trial.

You should also consider his relationship to the government or the defendant, his bias or impartiality and any motive he may have to testify falsely. It does not necessarily follow, of course, that because a person is interested in the result, he is incapable of telling a truthful version of an occurrence.

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The defendants McGee and Hagler have testified in this case. A defendant who wishes to testify is a competent witness and his testimony is to be judged in the same way as that of any other witness.

You have heard the testimony of Michael Hellerman, Robert Santis, Robert Kolbert, Stephen Adlman, Stephen Zardus and Murray Levine, who have admitted from the witness stand that they were engaged in illegal conduct and testified that the defendants on trial were active participants in this venture.

The testimony of alleged accomplices should be received with great caution and scrutinized with care. This does not mean that such testimony, if believed by you, is of any different or lesser quality than any other evidence. It should be considered by you, after being given whatever weight you think it deserves, along with all the other evidence given in the case in determining whether the guilt of the defendant has been proved beyond a reasonable doubt.

If you believe that a witness willfully testified falsely as to any material fact, you may disregard his testimony altogether or you may accept that part of his testimony which you believe worthy of credence. What you accept or reject as credible evidence is for you to determine, but you may not go outside the evidence to speculate as to the facts.

The quality of the testimony of the particular

witnesses, regardless of who calls them, rather than the quantity of witnesses, is the testimony to be used in arriving at your decision. There is no presumption that the witnesses for the government are more or less truthful or credible than the witnesses for the defendant.

Evidence that a witness has been convicted of a crime may only be considered by you in assessing his credibility as a witness and the weight which you will give to his testimony.

You should consider a witness' entire testimony, his direct examination, his cross examination and his redirect examination. You should consider the strength or weakness of his recollection in the light of all the testimony and attendant circumstances in this case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently. Innocent misrecollection, like failure of recollection, is not an unusual experience.

In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or to an unimportant detail and whether the discrepancy results from innocent error or willful falsehood.

You will recall that certain witnesses were asked about statements which they made under oath prior to trial and which it is claimed appear to be inconsistent with their testimony at this trial.

If a witness at trial affirms under oath the truth of a prior inconsistent statement under oath, the earlier statement may be considered by you both as affirmative proof of the facts contained in it as well as bearing on the credibility of the witness.

A prior inconsistent statement which was made under oath, either to the Grand Jury, or at some other trial, or before the Securities and Exchange Commission, and which the witness does not specifically reaffirm at this trial may be considered by you solely on the question of the witness' credibility and not as affirmative proof of the facts contained in it.

You have heard testimony that exculpatory statements were allegedly made by the defendants Koss and McGee when they were questioned before the Grand Jury or by the Securities and Exchange Commission. An exculpatory statement is one in which a person seeks to exonerate himself of having committed a crime. If you find that these statements were made and were false, and that they were made with the intention of diverting suspicion or misleading the government, then you may

consider these statements as indicating a consciousness of guilt.

Some question has been rased about the failure to call Murray Taylor as a witness to testify on this trial. Either side could have subpoenaed him to appear as a witness. Therefore, you are free to draw whatever inference you wish as to the failure of either party to call him as a witness, or you need not draw any inference at all.

There is no presumption against the government from its failure to call a witness if you find that his testimony would merely be cumulative or repetitious and of no greater value than witnesses who have testified on the trial.

However, as I pointed out above, a defendant need not offer any proof to sustain his innocence and the burden is on the government to prove its case beyond a reasonable doubt.

The defendants Koss and Hagler have offered evidence of their reputation in the community prior to the indictment in this case for being truthful, honest and men of integrity and law-abiding citizens. You should consider this testimony along with all the other evidence in the case in determining their guilt or innocence.

Evidence of a defendant's reputation as to those traits of character ordinarily involved in the commission of

the crime charged may of itself give rise to a reasonable doubt, since you may think it improbable that a person of good character with respect to those traits would commit such a crime. However, evidence of good reputation should not constitute an excuse to acquit the defendant, if after weighing all the evidence, including the evidence of good character, you are convinced beyond a reasonable doubt that the defendant is guilty of a crime charged in the indictment.

There have been several charts introduced into evidence during the course of this trial. These charts are not independent evidence of a defendant's guilt or innocence. They were admitted merely as a summary of the exhibits and testimony and are to be used by you solely as aids in understanding the proof adduced. The ultimate decision is for you and you alone to make after weighing all the evidence.

To the extent that any of the charts conform to what you determine the underlying facts to be, you may accept them; to the extent that they differ, you must reject them.

You may call for any exhibits which you desire to see in conjunction with your deliberations. You may call for a reading of any portion of the official transcript of the evidence or any portion of this charge.

You are instructed that the question of possible punishment of a defendant in the event of conviction is

no concern of the jury and should not in any sense enter into or influence your deliberations. The duty of imposing sentence in the event of conviction rests exclusively upon the Court. The function of the jury is to weigh the evidence in the case and determine the guilt or innocence of a defendant solely upon the basis of such evidence.

I have sought to avoid any comments which might suggest that I have personal views on the evidence, or that I have any opinion as to the guilt or innocence of any of the defendants, and you are not to assume that I have any such views or opinion. This charge is given to you solely to instruct you as to the law applicable to this case.

The actions of the Judge during the trial in granting or denying motions or ruling on objections by counsel or in statements to counsel or in attempting to clearly set forth the law in these instructions are not to be taken by you as any indication of any determination of the issues of fact. These matters, the actions of the Court, relate to procedure and law. You, the members of the jury, determine the facts. There are twelve members on this jury and all of you must agree upon any verdict you reach as to any defendant on any count in the indictment.

This case is obviously an important one to the defendants. It is equally important to the government. I

OPINION OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

-against- : 73 Cr. 903

THEODORE KOSS, KOSS SECURITIES CORPORATION, et al., :

Defendants. :

- x

METZNER, D. J.:

We are dealing here with a thirteen-count indictment which names sixteen defendants: fifteen individuals and one corporation. Count one charges all defendants with a conspiracy to violate the federal securities laws (15 U.S.C. §§ 77q(a), 77x, 78j(b) and 78ff and Rule 10b-5 (17 C.F.R. 240.10b-5)) and the federal mail fraud statute (18 U.S.C. § 1341). Count two charges five of the defendants (Koss, Koss Securities Corporation, Zardus, Santis and Schwartz) with substantive violations of Section 17(a) of the Securities Act of 1933. Count three charges all of the defendants with violations of Section 10(b) of the Securities Exchange Act of 1934.

Count four alleges that three of the defendants (Koss, Koss Securities Corporation and Zardus) violated Section 15(c)(2) of the 1934 Act. Counts five through eleven charge each defendant with mail fraud. Finally, counts twelve and thirteen charge defendant Koss with committing perjury and submitting false documents before the Securities and Exchange Commission.

Eleven of the defendants have now moved for a severance pursuant to Rule 14, Fed. R. Crim. P. As a general rule, persons joined in the same indictment should be tried together where the crimes charged may be proved against all of the defendants through the same evidence. United States v. Fantuzzi, 463 F.2d 683, 687 (2d Cir. 1972); United States v. Crisona, 271 F. Supp. 150, 153 (S.D.N.Y. 1967); United States v. Kahaner, 203 F. Supp. 78, 80-81 (S.D.N.Y. 1962), aff'd, 317 F.2d 459 (2d Cir.), cert. denied, 375 U.S. 836 (1963). In order to obtain a severance, a defendant must demonstrate "substantial prejudice from a joint trial, not just a better chance of acquittal at a separate one . . . ." United States v. Fantuzzi, supra at 687. Here the moving defendants have failed to meet that burden.

Each of the movants has urged that a severance is required because he is a "peripheral defendant," and that he will be highly prejudiced because a jury will be unable to follow the court's instructions to analyze the evidence separately as to each defendant.

In support of their motion, defendants rely on United States v. Kelly, 349 F.2d 720 (2d Cir. 1965), cert. denied, 384 U.S. 947 (1966), where the Second Circuit reversed the conviction of the defendant Shuck after a nine-month trial,in which his name was not mentioned until the third month,because of the prejudice resulting from his joint trial with the two main defendants. The court found that the "principal and inevitable prejudice . . . was caused by the slow but inexorable accummulation of evidence of fraudulent practices by Shuck's co-defendants." United States v. Kelly, supra at 756. Kelly, however, does not at this time support the instant motions for pretrial severance. The motions are all predicated on the defendants' assumptions of what they believe the government's proof at trial will be, and as such are sheer speculation. The government, of course, contests each defendant's characterization of his

participation in the alleged conspiracy and substantive offenses as being "minimal." At this point, the court only has opposing views as to what the evidence will show. As the trial unfolds the court will be in a better position to evaluate any claims of prejudice based on a defendant's role in the crimes charged. In this regard, United States v. Schaffer, 362 U.S. 511, 516 (1960) instructs that "the trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear." See also, United States v. Branker, 395 F.2d 881 (2d Cir. 1968), cert. denied, 393 U.S. 1029 (1969); United States v. Kelly, supra at 756.

Finally we note that in its present posture this case is not so complex that a jury would be unable to distinguish between defendants as to the evidence adduced. As Judge Lasker observed in United States v. Dioguardi, 332 F. Supp. 7, 12 (S.D.N.Y. 1971):

> "The experience within this very District has demonstrated the contrary; that is, that judges and juries have competently disposed of cases of the magnitude involved here."

If the motions of these eleven defendants were granted, we would have twelve trials and the benefit and

purpose of joinder would be lost.

The motions to sever on the ground of "minimal" participation are denied without prejudice to renewal if the proceedings at trial justify such action.

The defendants Anfang and Schwartz have also moved for a severance on the ground that a lengthy joint trial will cause them severe financial hardship, possibly resulting in the loss of their employment. A criminal trial affects the financial status of almost every defendant; however, it is not "in itself a sufficient basis for a severance." United States v. Dioguardi, supra at 13.

Anfang also argues that because of the estimated length of this trial (six to eight weeks) the "defendant will be unable to effectively defend the charges against him, . . . because of his inability to retain counsel." The nub of this claim is that the defendant will not be able to afford the fee of the privately retained counsel of his choice for such a lengthy trial, although he could afford that attorney for a shorter trial.

"Whether or not defendant is financially able to retain his own attorney is not determinative of

whether a severance should be granted." United States v. Wolfson, 294 F. Supp. 267, 276 (D. Del. 1968). In any case, the defendant has not indicated that he is indigent. In fact, he has been represented since his arraignment in this case on October 9, 1973 by the same privately retained counsel. As counsel was told at the argument of these motions, whether he will be able to represent the defendant at the trial on April 17 is a matter between him and his client. However, the trial will not be adjourned because of the defendant's inability to retain an attorney at this late date should his present attorney be unable to represent him. The trial date was set on November 5, 1973. It now appears that the defendant's choice of counsel was dependent on the outcome of his motion for a severance. Obviously the court will not countenance representation based on such speculation.

Defendants Adlman, Schwartz and Santis have each moved for a severance on the ground that it will be necessary for them to call various co-defendants to testify in their behalf. Adlman states "that he does not know some of the defendants at all and may request

their testimony in defense to affirm this denial." (Emphasis added.) Schwartz contends that "it may well be necessary . . . to call to witness stand a co-defendant Steven Zardus. That at this time it is not known whether or not Steven Zardus intends to take the witness stand on his own behalf or not." Finally, Santis declares that he "contemplates calling as witnesses in his behalf the said co-defendants."

In order to prevail in their contention that a severance is required so that a defendant may call a co-defendant as witness, these movants must demonstrate by a "clear showing" that the co-defendant would testify in exculpation. United States v. Kaufman, 291 F. Supp. 451, 452-53 (S.D.N.Y. 1968); see also, United States v. Kahn, 366 F.2d 259, 264 (2d Cir.), cert. denied, 385 U.S. 948 (1966); United States v. Dioguardi, supra at 13; cf., United States v. Echeles, 352 F.2d 892 (7th Cir. 1965). No such showing has been made here by any of the moving defendants. At this point the court is faced only with speculation that a defendant may wish to call a co-defendant who may or may not invoke his Fifth Amendment privilege. Consequently, the motions are denied without

prejudice to renewal. United States v. Kaufman, supra.

The defendant Santis has moved for a severance on the additional ground that in the course of a joint trial "if any or all of the co-defendants do not take the witness stand, counsel for the defendant may deem it necessary to comment on the failure of such party to testify," thereby violating the co-defendant's Fifth Amendment rights. By this argument defendant attempts to bring himself within the ambit of United States v. DeLuna, 308 F.2d 140 (5th Cir. 1962). This court has previously indicated that DeLuna did not confer an absolute right on a defendant to comment on his co-defendant's failure to testify. The question is "whether a defendant should be permitted to comment in order to assure him a fair trial." United States v. Kaufman, supra at 453-54. There has been no demonstration of mutually exclusive defenses or any inculpation by movant of any co-defendant. In short, the defendant has utterly failed to make the requisite showing of probable prejudice if he is not permitted to comment on his co-defendants' failure to testify. United States v. Marquez, 319 F. Supp. 1016, 1018 (S.D.N.Y. 1970), aff'd, 449 F.2d 89, 93 (2d Cir. 1971);

United States v. Caci, 401 F.2d 664, 672 (2d Cir. 1968), cert. denied, 394 U.S. 917 (1969).

Defendant Roth asks for a severance on the ground that he may elect not to testify at trial and may thus "subject himself to prejudicial inferences of guilt where other defendants have elected to testify on their own behalf." This claim is without merit. The defendant's Fifth Amendment rights will be fully protected at trial. The jury will be instructed as it always is that guilt is personal and that no inference is to be drawn from a defendant's failure to take the stand.

The defendants Roth and Koss also move for a severance on the ground that they will be prejudiced by the fact that some of the co-defendants or co-conspirators have criminal records. This ground, too, does not afford a proper basis for the granting of a severance. The fact that co-defendants may be of unsavory character or be the subject of prior criminal charges is a fact of life in many multiple defendant trials. Limiting instructions to the jury will adequately protect the defendant. Cf., United States v. Myers, 406 F.2d 746, 747 (4th Cir. 1969); United States v. Montague, 326 F. Supp. 911, 913 (N.D. Miss. 1970).

The Koss defendants have moved for a severance on the ground that one or more of the co-defendants may have made statements which might inculpate these defendants. This ground, too, is insufficient to grant a severance. First, defendants' motion is predicated solely on supposition; there is no indication that any inculpating confessions do in fact exist. Secondly, the defendants are protected from the use of any co-defendants' confessions which inculpate them under Bruton v. United States, 391 U.S. 123 (1968).

The defendant Weisman bases his request for a severance on medical grounds. He alleges that if he is forced to undergo a joint trial of a lengthy duration, his health will be severely impaired and he might die. In support of this motion the defendant has submitted an affidavit from his personal physician which, after describing defendant's ailments, concludes that in view of the defendant's age (73) and medical infirmities, a lengthy trial would be "of a special hazardous nature, and I have serious doubts as to whether Mr. Weisman could endure such an ordeal." The government concurs in the court's expressed views that the defendant shall be examined by

a physician appointed by the court, and a separate order will be entered to that effect.

Defendant Koss has moved for a severance of the perjury counts - counts twelve and thirteen - on the ground of misjoinder.

There is no question that the perjury charges contained in counts twelve and thirteen are properly joined under Rule 8. Rule 8(a) permits the joinder of two or more offenses against a single defendant (i.e., Koss) if the offenses are based on "two or more acts or transactions connected together or constituting parts of a common scheme or plan." In the instant case the government contends that the proof offered in support of the conspiracy charge is so interrelated to the perjury charges that it would entail calling the same witnesses and eliciting the same proof at separate trials. We believe that this offer of proof satisfies the joinder requirements of Rule 8(a). As the Court of Appeals noted in United States v. Carson, 464 F.2d 424, 436 (2d Cir.), cert. denied, 409 U.S. 949 (1972): "[T]he commonality of proof of the conspiracy charge and perjury crimes permitted joinder of the offenses under Fed. R. Crim. P. 8(a) . . . ." See also, United States v. Sweig, 316 F. Supp.

1148 (S.D.N.Y. 1970), aff'd, 441 F.2d 114, 118-19 (2d Cir.), cert. denied, 403 U.S. 932 (1971). Cf. United States v. Pacente, Docket No. 72-1988 (7th Cir. December 28, 1973). The motion to sever the perjury counts under Rule 8(a) is denied.

Koss has also moved to sever these counts under Rule 14 on the claim of prejudice. The only basis for this motion is that the perjury counts are unrelated to the activities charged in the remaining counts of the indictment. As we have just indicated, these counts are interrelated. (See, United States v. Sweig, supra). Therefore, defendant Koss has not demonstrated any prejudice which would justify the court exercising its discretion by granting a severance under Rule 14.

Defendant Layne has likewise moved for a severance of the perjury counts on the grounds of prejudice. He claims that these counts, in which only defendant Koss is named, are so innately prejudicial that he and the other fourteen defendants will be unable to obtain a fair trial on the remaining conspiracy and fraud charges.

In support of its position that there is no prejudice in trying these perjury counts with the remaining

charges, the government relies on United States v. Sweig, supra, and United States v. Carson, supra. Sweig and Carson, however, are distinguishable on their facts from the instant case since each involved only a single defendant on trial. They are authority for denying Koss's motion, but not the motions of the other defendants. Here, sixteen defendants are being tried together and only one of that number is charged with perjury. I conclude that in a multi-defendant case, in which all of the defendants are charged with engaging in joint criminal activity, prejudice will undoubtedly flow to the fifteen defendants not named in the perjury counts. By reason of the joint charges and proof, it is likely that the perjury counts would adversely "rub off" on the remaining defendants. A similar result was reached by Judge Murphy in United States v. Re, 62 Cr. 307 (Unreported Opinion, August 10, 1962), which was a seven-defendant securities fraud case where three defendants were charged with making false declarations. See also, United States v. Re, 336 F.2d 306, 308, n.1 (2d Cir. 1964).

Finally, I see no undue hardship to the government at this time. If a conviction of Koss is obtained in the first trial, it may decide not to proceed with the trial

on the perjury counts. Similarly, if an acquittal is found, the basis for the perjury counts is weakened and again, there may be no second trial.

The motion to sever counts twelve and thirteen is granted.

So ordered.

Dated: New York, N. Y.
March 12, 1974

Charles H. Metzner
U. S. D. J.